IN THE UPPER TRIBUNAL **Appeal No. V/2719/2019**
ADMINISTRATIVE APPEALS CHAMBER

ON APPEAL FROM
Appellant: **KB**
Respondent: **Disclosure and Barring Service**
DBS Ref No: **DBS6188 & DBS725;**
Customer ref: **00905256673**
DBS ID Number: **P0000ATT7WV**

Between:

KB

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Jones**
Tribunal Member Brian Cairns
Tribunal Member Sallie Prewett

Hearing date: 19 July 2021

Representation:
Appellant: In Person
Respondent: Mr Webster, Counsel instructed on behalf of the Respondent

DECISION

The decision of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the Disclosure and Barring Service taken on 18 June 2019 to include the Appellant's name in the Children's and Adults' Barred Lists did not involve a material error on a point of law or fact. It is confirmed.

The Upper Tribunal further directs that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify any person who has been involved in the circumstances giving rise to this appeal.

This decision and direction are given under section 4(5) of the Safeguarding Vulnerable Groups Act 2006 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Introduction

1. The Appellant appeals the decision of 18 June 2019 of the Respondent (the Disclosure and Barring Service or 'DBS') to include her name in the Children's and Adults' Barred Lists ("CBL" and "ABL") pursuant to paragraphs 3 and 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the Act")

2. Permission to appeal was granted by Judge Jones on the papers on 2 November 2020 in respect of all grounds raised by the Appellant in her notice of appeal including a ground for which permission was conceded by the Respondent.

3. We held an oral hearing of the appeal in the Rolls Building, London on 19 July 2021. The Appellant was present, together with her father as support. She was unrepresented but gave oral evidence and made submissions. The Respondent was represented by Mr Webster of counsel. We are very grateful to both the Appellant and counsel for the presentation of their cases.

Rule 14 Direction - Anonymity

4. At the outset of the hearing we made an order that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify any person who has been involved in the circumstances giving rise to this appeal pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008. We are satisfied that neither the appellant (KB), nor her family (her former husband, and her children A & B), nor those involved in the allegations against her should be identified, directly by name or indirectly, in this decision.

5. We also made an order under rule 14(1)(a) that no documents or information should be disclosed in relation to these proceedings that would tend to identify any person who has been involved in the circumstances giving rise to this appeal. Any documents sought to be disclosed would need to be redacted for identifying information.

6. We are satisfied that such publication or disclosure would be likely to cause serious harm to the Appellant and her family, in particular her children A & B. Having regard to the interests of justice, we were satisfied that it is proportionate to give such a direction. This is for the reason that revealing the identity of any member of the family would identify the rest

and revealing the nature of the allegations to the public or to the children would be likely to cause the Appellant and her children serious emotional or psychological harm.

The Decision subject to appeal

7. On 18 June 2019 the DBS made a decision to include the Appellant on the CBL and ABL finding that she had engaged in relevant conduct in respect of children and vulnerable adults. Relevant parts of the decision state:

'The…. DBS is satisfied that you might in the future be engaged in regulated activity with children and vulnerable adults. This is because you have applied to work as an Emergency Medical Technician.

Having considered all of the information available to it, the DBS is satisfied that you have engaged in relevant conduct in relation to children, specifically conduct which endangered a child or was likely to endanger a child.

Having considered all of the information available to it, the DBS is also satisfied that you have engaged in relevant conduct in relation to vulnerable adults, specifically conduct which if repeated against or in relation to vulnerable adult or would endanger that vulnerable adult or would be likely to endanger him or her…..'

8. The DBS made two clear findings of fact upon which it relied as constituting relevant conduct for the purpose of Schedule 3 to the Act:

'We are satisfied that on the balance of probabilities:
- In April 2017 you made threats to physically harm your children as a result of your mental health issues
- In November 2017 you gave antihistamine tablets to other patients whilst you were also an in-patient in a mental health facility. This resulted in all of you being taken to hospital.'

9. As regards the proportionality of the Respondent's decision the letter stated:

'There remains insufficient evidence within the case papers to indicate that you would be able to act in an appropriate manner were you to be employed with vulnerable groups in the future or that you are actively engaging with medical professionals to gain assistance for your mental health issues. This alongside the most recent information which indicates that you are not allowed unsupervised access to your own children adds weight to the concerns that you are still at risk of causing harm, whether that be emotional of (sic) physical harm, to your children...

In making our bar decision the DBS has made a consideration of proportionality. It is acknowledged that a bar decision means you are barred from the entirety of regulated activity with Children and Vulnerable Adults for a minimum ten year period (subject to any potential future application for review) however any decision must balance the risks of physical and emotional harm to children and vulnerable adults against your rights to seek employment in regulated activity. Whilst the DBS are not a punitive organisation it must be recognised that we are not only concerned about your own mental health

issues, but also the behaviour that you have displayed that it is linked to, and appears to be driven by your mental health issues, and this is of significant concern.

Therefore the evidence presents serious safeguarding concerns with regards to you working with children and vulnerable adults in the future as such the decision to bar you from working with children and vulnerable adults is appropriate and proportionate.'

10. In a further letter dated 1 October 2019, the DBS replied to late representations the Appellant had made against her inclusion on the lists. The letter included the following:

'You stated that you had made an error buying medication for others and would not repeat this nor would you ever harm your children and that these events had occurred due to your own mental health issues. You went on to say that social services had agreed that there was no risk of physical harm, from you to your children and that you had asked for this information to be forwarded to the DBS. It is noted that your ex husband did submit a supporting statement and he believes that you have improved and that you do not pose any physical threat to your children.

Nonetheless there is no medical evidence or information from Children's Services to support your claims despite allowing additional time for this information to be submitted.

You have stated that you are managing to work part time in a non-challenging non regulated activity role, however there is no evidence to indicate how you would cope with the demands and pressures of working in regulated activity where you could be responsible for the health and welfare of children and vulnerable adults.

Whilst it is commendable that you are attempting to address your mental health and addiction issues, and you appear to be in a recovery stage, you have admitted that you have relapsed on a number of occasions and the potential for physical and emotional harm towards vulnerable groups should you relapse in the future, whilst in regulated activity, is not negated by your current positive actions. This is due to the relatively short period of time that you state you have had mental stability, the fact that this is not supported by any medical evidence, or children's services and that you have had relapses in your recovery...'

The Appellant's Grounds of Appeal

11. The Appellant's first ground of appeal as contained in her notice of appeal dated 21 November 2019 can be summarised as follows:

a. The Respondent made the following mistakes of fact:
i. The Appellant did not engage in conduct which endangered a child.
ii. When the Appellant, during a hallucination, said that God was telling her to kill herself and take her children with her that was not a threat towards her children.
iii. The Appellant bringing a packet of promethazine to the ward and sharing them with 2 other patients did not amount to an attempt to intentionally harm 2 vulnerable adults.

12. As regards the first finding of relevant conduct in April 2017 relating to her child, she stated the DBS had made a mistake of fact:

'Firstly, it is said that it has been proven that I engaged in conduct which endangered a child. This is not correct. It is said that I made threats to harm my children specifically during a hallucination in which I said God was telling me to kill myself and take my children with me. This was absolutely not a threat against my children. This was me reaching out to mental health professionals, scared and frightened and confused and asking for help. By telling them what I was experiencing I was hoping they could help stop the hallucination and there was never any intention to harm my children and this was not a threat to harm them. At no point during my illness have I ever thought about physically harming my children. Even when acutely psychotic after the birth of my daughter I still got up and did every night feed with her whilst my husband slept in the spare room. I have always put my children first and tried to care for them even when very unwell. The fact is actually that I was seeking help when I explained that I believed God was telling me to kill myself and my children and I was actually incredibly scared of this, and in no way was this are a threat to harm or kill my children. The DBS have wrongly interpreted it as a threat towards my children and have stated this is conduct which has endangered a child I have never engaged in any conduct which would endanger a child. I have only ever tried to harm myself during the period I was unwell.'

13. As regards the second finding or relevant conduct in November 2017 relating to vulnerable adults, she stated:

'Secondly, I am included on the vulnerable adults list because I brought in a packet of promethazine to the ward and shared them with two other patients. The DBS have concluded that this was an attempt to intentionally harm two vulnerable adults. This is completely incorrect. The facts are actually that I was a sectioned patient at the time and was equally as vulnerable as the two other patients. I was the only one who had leave granted and I was manipulated by the other patients into agreeing to take their money and buy the promethazine and bring them back. Had I not been unwell I would have 100% refused to buy them, but I was vulnerable myself and was easily led. This was not a case of a well person intentionally harming two vulnerable adults as the DBS have concluded, but a case of three vulnerable adults making a stupid decision together. Had I been a staff member on the ward, or a visitor, I could understand the DBS coming to the conclusion they have, but the facts are I was just as vulnerable as the other two patients and I was also a sectioned patient with limited mental capacity at the time. To state that I deliberately tried to harm two adults is a huge error and this is a clear mistake of fact.'

14. The Appellant's second, third and fourth grounds of appeal submitted that the Respondent had made mistakes of law in barring her from working with vulnerable adults and children. She submitted that:

b. In view of the factual mistakes identified at (a) above, the Respondent made an error of law in concluding that the Appellant engaged in relevant conduct.

c. The Appellant's inclusion in the Lists was disproportionate in view of (i) the information held by the Respondent in relation to future risk and (ii) the Respondent's failure to obtain up to date medical and/or social services information so as to inform its conclusions as to future risk.

d. The Appellant's inclusion on the list was clear discrimination in breach of the Equalities Act.

Background Chronology

15. The most significant events that have occurred in the course of this case are as follows:

• April 2017: Appellant's children made subject to child protection plan after she allegedly made threats to physically harm her children as a result of mental ill-health
• 21 November 2017: Appellant gave promethazine (non-prescription antihistamine) tablets to other patients while she was also an in-patient in a mental health facility
• 18 April 2018: Respondent issued Early Warning Letter
• 19 March 2019: Respondent issued Minded to Bar Letter
• **18 June 2019: Respondent issued Final Decision Letter including her in CBL & ABL**
• 29 August 2019: Email from Appellant's ex-husband in support
• 3 September 2019: Appellant made late representations to Respondent
• 1 October 2019: Respondent issued decision to keep Appellant on the Lists
• **2 December 2019: Appellant lodged appeal to the Upper Tribunal**
• 23 January 2020: Respondent decided to review its decision and invited Appellant to provide information referenced in her representations

- 28 August 2020: Respondent concedes limited permission may be granted on the ground of procedural error in making the decision
- 21-23 September 2020: Appellant admitted to hospital suffering drug induced psychosis caused by cocaine
- 18 May 2021: confirmation that the Respondent's review initiated on 23 January 2020 under paragraph 18A of Schedule 3 remains ongoing

Law

The lists and listing under the 2006 Act

16. The Safeguarding Vulnerable Groups Act 2006 ('the Act') established an Independent Barring Board which was renamed the Independent Safeguarding Authority ('ISA') before it merged with the Criminal Records Bureau ('CRB') to form the Disclosure and Barring Service ("DBS").

17. So far as is relevant, section 2 of the Act, as amended, provides as follows:

'2(1) DBS must establish and maintain—

(a) the children's barred list;

(b) the adults' barred list.

(2) Part 1 of Schedule 3 applies for the purpose of determining whether an individual is included in the children's barred list.

(3) Part 2 of that Schedule applies for the purpose of determining whether an individual is included in the adults' barred list.

(4) Part 3 of that Schedule contains supplementary provision.

(5) In respect of an individual who is included in a barred list, DBS must keep other information of such description as is prescribed.'

Children's barred list

18. The relevant provisions (paragraphs 2 to 5) of Part 1 of Schedule 3 to the Act, on the children's barred list, provide as follows:

2(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.
(2) Sub-paragraph (4) applies if it appears to DBS that—
(a) this paragraph applies to a person, and
(b) the person is or has been, or might in future be, engaged in regulated activity relating to children.
(4) [DBS] must give the person the opportunity to make representations as to why the person should not be included in the children's barred list.
(5) Sub-paragraph (6) applies if—
(a) the person does not make representations before the end of any time prescribed for the purpose, or
(b) the duty in sub-paragraph (4) does not apply by virtue of paragraph 16(2).
(6) If [DBS]—
(a) is satisfied that this paragraph applies to the person, and
(b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children,
it must include the person in the list.
(7) Sub-paragraph (8) applies if the person makes representations before the end of any time prescribed for the purpose.
(8) If [DBS]—
(a) is satisfied that this paragraph applies to the person,
(b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
(c) is satisfied that it is appropriate to include the person in the children's barred list, it must include the person in the list.

3 (1) This paragraph applies to a person if–
(a) it appears to DBS that the person
(i) has (at any time) engaged in relevant conduct, and
(ii) is or has been or might in future be, engaged in regulated activity relating to children and
(b) DBS proposes to include him in the children's barred list.
(2) DBS must give the person the opportunity to make representations as to why he should not be included in the children's barred list.
(3) DBS must include the person in the children's barred list if–
(a) it is satisfied that the person has engaged in relevant conduct, and
(aa) it has reason to believe that the person is or has been or might in future be, engaged in regulated activity relating to children, and
(b) it is satisfied that it is appropriate to include the person in the list.

[Emphasis added]

4 (1) For the purposes of paragraph 3 relevant conduct is–
(a) conduct which endangers a child or is likely to endanger a child;
(b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;

(c) conduct involving sexual material relating to children (including possession of such material);
(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images) if it appears to DBS that the conduct is inappropriate;
(e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate;
(2) A person´s conduct endangers a child if he–
(a) harms a child,
(b) causes a child to be harmed,
(c) puts a child at risk of harm,
(d) attempts to harm a child, or
(e) incites another to harm a child.
(3) "Sexual material relating to children" means –
(a) indecent images of children, or
(b) material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification.
(4) "Image" means an image produced by any means, whether of a real or imaginary subject.
(5) ...
(6) For the purposes of sub-paragraph 1(d) and (e) DBS must have regard to guidance issued by the Secretary of State as conduct which is inappropriate.

5 (1) This paragraph applies to a person if –
(a) it appears to DBS that the person
(i) falls within sub-paragraph (4), and
(ii) is or has been or might in future be, engaged in regulated activity relating to children, and
(b) DBS proposes to include him in the children's barred list.
(2) DBS must give the person the opportunity to make representations as to why he should not be included in the children's barred list.
(3) DBS must include the person in the children's barred list if–
(a) it is satisfied that the person falls within sub-paragraph (4),
(aa) it has reason to believe that the person is or has been or might in future be, engaged in regulated activity relating to children, and
(b) it is satisfied that it is appropriate to include the person in the list.
(4) A person falls within this sub-paragraph if he may–
(a) harm a child,
(b) cause a child to be harmed,
(c) put a child at risk of harm,
(d) attempt to harm a child, or
(e) incite another to harm a child.'

Vulnerable adults' barred list

19. The relevant provisions (paragraphs 8 to 11) of Part 2 of Schedule 3 to the Act, on the vulnerable adults' barred list, provide as follows:

8(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this
paragraph is satisfied in relation to the person.
(2) Sub-paragraph (4) applies if it appears to DBS that—
(a) this paragraph applies to a person, and
(b) the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults.
.....

(4) **[**DBS**]** must give the person the opportunity to make representations as to why the person should not be included in the adults' barred list.
(5) Sub-paragraph (6) applies if—
(a) the person does not make representations before the end of any time prescribed for the purpose, or
(b) the duty in sub-paragraph (4) does not apply by virtue of paragraph 16(2).
(6) If **[**DBS**]** —
(a) is satisfied that this paragraph applies to the person, and
(b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, it must include the person in the list.
(7) Sub-paragraph (8) applies if the person makes representations before the end of any time
prescribed for the purpose.
(8) If **[**DBS**]** —
(a) is satisfied that this paragraph applies to the person,
(b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and
(c) is satisfied that it is appropriate to include the person in the adults' barred list, it must include the person in the list.

9 (1) This paragraph applies to a person if–
(a) it appears to **[**DBS**]** that the person **[—]**
[(i) has (at any time) engaged in relevant conduct, and
(ii) is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and**]**
(b) **[**DBS**]** proposes to include him in the adults' barred list.
(2) **[**DBS**]** must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.
(3) [DBS] must include the person in the adults' barred list if–
(a) it is satisfied that the person has engaged in relevant conduct, […]
[(aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and]
(b) it [is satisfied] that it is appropriate to include the person in the list.

[Emphasis added]

10 (1) For the purposes of paragraph 9 relevant conduct is–
(a) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;
(b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;
(c) conduct involving sexual material relating to children (including possession of such material);
(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to **[**DBS**]** that the conduct is inappropriate;
(e) conduct of a sexual nature involving a vulnerable adult, if it appears to **[**DBS**]** that the conduct is inappropriate.
(2) A person's conduct endangers a vulnerable adult if he–
(a) harms a vulnerable adult,
(b) causes a vulnerable adult to be harmed,
(c) puts a vulnerable adult at risk of harm,
(d) attempts to harm a vulnerable adult, or
(e) incites another to harm a vulnerable adult.
(3) "Sexual material relating to children" means–
(a) indecent images of children, or

(b) material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification.
(4) "Image" means an image produced by any means, whether of a real or imaginary subject.
(5) A person does not engage in relevant conduct merely by committing an offence prescribed for the purposes of this sub-paragraph.
(6) For the purposes of sub-paragraph (1)(d) and (e), **[**DBS**]** must have regard to guidance issued by the Secretary of State as to conduct which is inappropriate.

11 (1) This paragraph applies to a person if–
(a) it appears to **[**DBS**]** that the person **[**—**]**
[(i) falls within sub-paragraph (4), and
(ii) is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and**]**
(b) **[**DBS**]** proposes to include him in the adults' barred list.
(2) **[**DBS**]** must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.
(3) **[**DBS**]** must include the person in the adults' barred list if–
(a) it is satisfied that the person falls within sub-paragraph (4), **[…]**
[(aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and**]**
(b) it **[**is satisfied**]** that it is appropriate to include the person in the list.
(4) A person falls within this sub-paragraph if he may–
(a) harm a vulnerable adult,
(b) cause a vulnerable adult to be harmed,
(c) put a vulnerable adult at risk of harm,
(d) attempt to harm a vulnerable adult, or
(e) incite another to harm a vulnerable adult.

20. There are three separate ways in which a person may be included in the barred lists under Schedule 3 to the Act.

21. The first category is under paragraphs 1 and 7 of Schedule 3 to the Act, where a person will be automatically included in the lists without any right to make representations ('autobar'). This is where they have been convicted of certain specified criminal offences or made subject to specified orders set out within Regulations 3 and 5 and paragraphs 1 and 3 of the Schedule to The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 ('The Regulations').

22. The second category is under paragraphs 2 and 8 of Schedule 3 to the Act, where a person will be included in the lists if they meet the prescribed criteria. The person who is proposed to be barred has a right to make representations to the DBS ('autobar with representations'). There are prescribed criteria where a person has been convicted of certain specified criminal offences or made subject to specified orders but nonetheless is entitled to make representations as to inclusion on the list. The prescribed criteria are set out within Regulations 4 and 6 and paragraphs 2 and 4 of the Schedule to The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009.

23. If a person falls within the prescribed criteria under the Regulations, they satisfy subparagraph (1) of the following paragraphs and therefore under paragraphs 2(6), (2)(8), 8(6) or 8(8) of Schedule 3 to the Act, the DBS will include the person in the children's or adults' barred list if it:

a) is satisfied that this paragraph applies to the person,
b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to [children or adults], and [so long as the person has made representations regarding their inclusion]
c) is satisfied that it is appropriate to include the person in the children's barred list, it must include the person in the list.

24. In contrast, this appeal concerns the third category ('discretionary barring') where a person does not meet the prescribed criteria (has not been convicted of specified criminal offences nor made subject to specified orders as set out within the Regulations and the Schedule thereto), and therefore paragraphs 3 and 9 of Schedule 3 to the Act apply.

25. It is the third category under which the DBS made the decision to bar the Appellant.

26. Under paragraphs 3(3) and 9(3) of Schedule 3 the DBS must include the person in the children's barred list if:
(a) it is satisfied that the person has engaged in relevant conduct, and
(aa) it has reason to believe that the person is or has been or might in future be, engaged in regulated activity relating to children, and
(b) it is satisfied that it is appropriate to include the person in the list.

27. 'Relevant conduct' is defined under paragraphs 4 and 10 of Schedule 3 to the Act as set out above.

28. The difference between the sets of criteria in the second and third categories is where a person meets the prescribed criteria for automatic inclusion with representations (has been convicted of a specified offence or made subject of a specified order), the DBS is not required to decide if the person has been engaged in relevant conduct. This is because the statutory scheme appears designed so that a specified criminal conviction which satisfies the prescribed criteria, renders the need to make any findings about a person's conduct otiose.

The Right of Appeal and jurisdiction of the Upper Tribunal

29. Appeal rights against decisions made by the Respondent (DBS) are governed by section 4 of the Act. Section 4(1) provides for a right of appeal to the Upper Tribunal against a decision to include a person in a barred list or not to remove them from the list. Section 4 states:

'4(1) An individual who is included in a barred list may appeal to the [Upper] Tribunal against—
(a) . . .

(b) a decision under paragraph [2,] 3, 5, [8,] 9 or 11 of [Schedule 3] to include him in the list;
(c) a decision under paragraph 17[, 18 or 18A] of that Schedule not to remove him from the list.

(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 Upper Tribunal.

(5) Unless the Upper Tribunal finds that [the DBS] has made a mistake of law or fact, it must confirm the decision of DBS.

(6) If the Upper Tribunal 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 Upper Tribunal remits a matter to [the DBS] under subsection (6)(b)—
(a) the Tribunal 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.'

[Emphasis added]

30. Thus section 4(2) of the Act provides that a person included in (or not removed from) either barred list may appeal to the Upper Tribunal on the grounds that the DBS has made a mistake of law (including the making of an irrational or disproportionate decision) or a mistake of fact on which the decision was based.

31. Although not provided for by statute, the common law requires that any mistake of fact or law, normally referred to as 'errors', must be material to the ultimate decision ie. that they may have changed the outcome of the decision – see [102] of the *RCN* judgment set out below.

32. It is important to emphasise that an appeal to the Upper Tribunal can only succeed if the DBS *erred in law or fact* **–** see section 4(5).

Mistake or error of fact

33. Some mistakes of fact will amount to errors of law, for example, if it is demonstrated that the DBS took into account evidence that was irrelevant, or failed to take into account evidence that was relevant or made a finding that was unreasonable – no reasonable tribunal could have arrived at upon the evidence before it.

34. However, by virtue of section 4(2), mistakes of fact which are not also errors of law may also constitute a ground upon which the Upper Tribunal may interfere with a DBS decision. This type of mistake of fact might be if the DBS recorded or interpreted evidence before it inaccurately or incorrectly or relied upon evidence which was inaccurate or incorrect as a matter of fact.

35. So long as the DBS takes account of the relevant evidence, provides rational reasons and makes no errors in the facts relied upon for rejecting a barred person's account on the balance of probabilities, this is unlikely to give rise to an arguable mistake of fact. In other words, an appeal before the Upper Tribunal is not a full merits appeal on the facts – see [104] of the *RCN* judgment below.

36. However, the Upper Tribunal may make its own fresh findings of fact having heard all potentially relevant evidence during the appeal process by which it may judge whether the DBS made a mistake of fact in making its decision.

37. The extent of the jurisdiction for the Upper Tribunal to make findings of fact was considered in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC) at [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.'

Appropriateness

38. Section 4(3) of the Act provides that the appropriateness of a person's inclusion on either barred list is not a question of law or fact. Unless the DBS has made a material error of law or fact the Upper Tribunal may not interfere with the decision - *R v (Royal College of Nursing and Others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin) ('*RCN*') at [102]-[104]:

> 102. During oral submissions there was some debate about the meaning to be attributed to the phrase "a mistake ….in any finding of fact within section 4(2)(b) of the Act". I can see no reason why the sub-section should be interpreted restrictively. In my judgment the Upper Tribunal has jurisdiction to investigate any arguable alleged wrong finding of fact provided the finding is material to the ultimate decision.
>
> 103. In light of the fact that the Upper Tribunal can put right any errors of law and any material errors of fact and, further, can do so at an oral hearing if that is necessary for the fair and just disposition of the appeal I have reached the conclusion that the absence of a right to an oral hearing before the Interested Party and the absence of a full merits based appeal to the Upper Tribunal does not infringe Article 6 EHCR. To repeat, an oral hearing before the Interested Party is permissible under the statutory scheme and there is no reason to suppose that in an appropriate case the Interested Party would not hold such a hearing as Ms Hunter asserts would be the case. I do not accept that this possibility is illusory as suggested on behalf of the Claimants. Indeed, a failure or refusal to conduct an oral hearing in circumstances which would allow of an argument that the failure or refusal was unreasonable or irrational would itself raise the prospect of an appeal to the Upper Tribunal on a point of law. Further, any other error of law and relevant errors of fact made by the Interested Party can be put right on an appeal which, itself, may be conducted by way of oral hearing in an appropriate case.
>
> 104. I am more troubled by the absence of a full merits based appeal but I am persuaded that its absence does not render the scheme as a whole in breach of Article 6 for the following reasons. First, the Interested Party is a body which is independent of the executive agencies which will have referred individuals for inclusion/possible inclusion upon the barred lists. It is an expert body consisting of a board of individuals appointed under regulations governing public appointments and a team of highly-trained case workers. Paragraph 1(2)(b) of Schedule 1 to the 2006 Act specifies that the chairman and members "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults." The Interested Party is in the best position to make a reasoned judgment as to when it is appropriate to include an individual's name on a barred list or remove an individual from the barred list. In the absence of an error of law or fact it is difficult to envisage a situation in which an appeal against the judgment of the Interested Party would have any realistic prospect of success. Second, if the Interested Party reached a decision that it was appropriate for an individual to be included in a barred list or appropriate to refuse to remove an individual from a barred list yet that conclusion was unreasonable or irrational that would constitute an error of law. I do not read section 4(3) of the Act as precluding a challenge to the ultimate decision on grounds that a decision to include an individual upon a barred list or to refuse to remove him from a list was unreasonable or irrational or, as Mr. Grodzinski submits, disproportionate. In my judgment all that section 4(3) precludes is an appeal against the ultimate decision when that decision is not flawed by any error of law or fact.

Mistake or error of law

39. A mistake or error of law, includes instances where the DBS have got the particular legal test or tests wrong (applied or interpreted the law incorrectly), or failed to consider all the relevant evidence or made a

perverse, unreasonable or irrational finding of fact, or failed to explain the decision properly by giving sufficient or accurate reasons, or breached the rules of natural justice by failing to provide a fair procedure.

40. A mistake of law will also include instances where the decision to bar was disproportionate.

Proportionality

41. Where it is alleged that the decision to include a person in a barred list is disproportionate to the relevant conduct or risk of harm relied on by the DBS, the Tribunal must, in determining that issue, give appropriate weight to the view of the DBS as it is enabled by statute to decide appropriateness - see the Court of Appeal's judgment in *Independent Safeguarding Authority v SB (Royal College of Nurses intervening)* [2012] EWCA Civ 977**;** [2013] 1WLR 308 at paragraphs [16]-[22] (ISA formerly assuming the role of the DBS):

16. The ISA is an independent statutory body charged with the primary decision making tasks as to whether an individual should be listed or not. Listing is plainly a matter which may engage Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Article 8 provides a qualified right which will require, among other things, consideration of whether listing is "necessary in a democratic society" or, in other words, proportionate. In *R (Quila) v Secretary of State for the Home Department* [2011] 3 WLR 836, Lord Wilson summarised the approach to proportionality in such a context which had been expounded by Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 (at paragraph 19). Lord Wilson said (at paragraph 45) that:

> "… in such a context four questions generally arise, namely: (a) is the legislative object sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?"

There, as here, the main focus is on questions (c) and (d). In *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 Lord Bingham explained the difference between such a proportionality exercise and traditional judicial review in the following passage (at paragraph 30):

> "There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test … The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time … Proportionality must be judged objectively by the court …"

17. All that is now well established. The next question – and the one upon which Ms Lieven focuses – is how the court, or in this case the UT, should approach the decision of the primary decision-maker, in this case the ISA. Whilst it is apparent from authorities such as *Huang* and *Quila* that it is wrong to approach the decision in question with "deference", the requisite approach requires

> "… the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

Per Lord Bingham in *Huang* (at paragraph 16) and, to like effect, Lord Wilson in *Quila* (at paragraph 46). There is, in my judgment, no tension between those passages and the approach seen in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 which was concerned with a challenge to the decision of the City Council to refuse a licensing application for a sex shop on the grounds that the decision was a disproportionate interference with the claimant's Convention rights. Lord Hoffmann said (at paragraph 16):

> "If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights."

Lady Hale added (at paragraph 37):

> "Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, the court would find it hard to upset the balance which the local authority had struck."

These passages are illustrative of the need to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation.

…….

22. This brings me to two particular points. First, there is the fact that, unlike the ISA, the UT saw and heard SB giving evidence. However, it cannot be suggested that it was unlawful for the ISA not to do so. It had had at its disposal a wealth of material, not least the material upon which the criminal conviction had been founded and which had informed the sentencing process. The objective facts were not in dispute. Secondly, Mr Ian Wise QC, on behalf of the Royal College of Nursing, emphasises the fact that the UT is not a non-specialist court reviewing the decision of a specialist decision-maker, which would necessitate the according of considerable weight to the original decision. It is itself a specialist tribunal. Whilst there is truth in this submission, it has its limitations for the following reasons: (1) unlike its predecessor, the Care Standards Tribunal, it is statutorily disabled from revisiting the appropriateness of an individual being included in a Barred List, *simpliciter*; and (2) whereas the UT judge is flanked by non-legal members who themselves come from a variety of relevant professions, they are or may be less specialised than the ISA decision-makers who, by paragraph 1(2) of schedule 1 to the 2006 Act "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults". I intend no disrespect to the judicial or non-legal members of the UT in the present or any other case when I say that, by necessary statutory qualification, the ISA is particularly equipped to make safeguarding decisions of this kind, whereas the UT is designed not to consider the appropriateness of listing but more to adjudicate upon "mistakes" on points of law or findings of fact (section 4(3)).

42. In summary, questions of proportionality should be examined applying the tests laid down by Lord Wilson in *R (Aguilar Quila) v Secretary of Stage for the Home Department* [2012] 1 AC 621 at para 45:

…But was it “necessary in a democratic society”? It is within this question that an assessment of the amendment's proportionality must be undertaken. In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, Lord Bingham suggested, at para 19, that in such a context four questions generally arise, namely:
a) is the legislative objective sufficiently important to justify limiting a fundamental right?
b) are the measures which have been designed to meet it rationally connected to it?
c) are they no more than are necessary to accomplish it?

d) do they strike a fair balance between the rights of the individual and the interests of the community?

43. In assessing proportionality, the Upper Tribunal has '*…to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation*' (see *Independent Safeguarding Authority v SB* [2012] EWCA Civ 977 at [17] as set out above).

Burden and Standard of proof

44. The burden of proof is upon the DBS to establish the facts and relevant conduct upon which it relies. The standard of proof to which the DBS and the Upper Tribunal must make findings of fact is on the balance of probabilities, ie. what is more likely than not. This is a lower threshold than the standard of proof in criminal proceedings (being satisfied so that one is sure or beyond reasonable doubt).

The Appellant's submissions

Mistake of fact:

45. The Appellant submitted that as far as she could see in her medical records that the DBS had provided, there were limited arguments to prove she was threatening to harm her children. What she argued that the DBS were relying upon was a comment she made explaining a hallucination to a member of staff whilst she was sectioned in a psychiatric ward. She would leave it up to the Upper Tribunal to decide whether this amounted to a threat to harm her children. She believed it did not. Therefore, she submitted there was a clear mistake of fact.

46. In relation to the second finding of relevant conduct, the Appellant accepted she did engage in conduct that could have put someone at risk, however, the DBS had used "deliberately" in their communications, and therefore their wording amounts to a mistake of fact.

47. She submitted that these mistakes amount to clear mistakes of fact so her appeal should be successful on these grounds alone.

Mistake of law:

48. The Appellant submitted that the DBS were discriminating against her.

49. She believed the evidence the DBS had in their possession showed clearly why she should not be on these barring lists, yet she still was. She submitted that this is a breach of her human rights, under article 4, the equalities act, and it is disproportionate to bar her from working within in the public sector as she has done for many years successfully, for another 8 years.

50. She submitted that these mistakes amount to clear mistakes of law, and she should be removed from the Barred Lists immediately, as she poses no risk to children or vulnerable adults and keeping her on the lists is not acceptable.

51. The Appellant relied on the medical reports provided to her by the DBS, as being absolutely key to the appeal. She did not believe that social services information should be relied upon because Social Services have not been involved with her family for 9 months and before they were involved for her last application for a child arrangement order, the Appellant had once again been discharged for a number of months. Therefore, she argued that social services had no up to date information about her family and her risk to her children or vulnerable adults.

Discussion and Decision

The Relevant Conduct

52. It is not in dispute that the Appellant has previously or intends to engage in regulated activity for the purposes of paragraphs 3 and 9 of Schedule 3 to the Act. Therefore, we first examine whether there was any mistake of fact or law in the Respondent's two findings that the Appellant engaged in relevant conduct for the purposes of paragraphs 3(3)(a) and 9(3)(a) of Schedule 3.

53. We begin by making factual findings in light of all the evidence before us at the hearing rather than only that evidence available to the DBS at the time of making its decision in June 2019.

54. We make our findings on the balance of probabilities, the burden of proof being upon the DBS to satisfy us of the conduct found.

'First Finding - In April 2017 you made threats to physically harm your children as a result of your mental health issues'

55. The Respondent found that in April 2017 the Appellant made threats to physically harm her children as a result of her mental health issues.

56. The Respondent's finding in June 2019 was predicated upon information from a Senior Practitioner, Family Support Team, of a County Council dated 15 July 2018 to the effect that:

> 'The children were made subject to child protection plans from April 2017 following [the Appellant] making threats to physically harm the children as the result of her being unwell...
>
> The Local Authority issued care proceedings and an Interim Supervision Order was granted on the 23 January 2018, with the plan for the children to remain in the care of [the Appellant's then husband], the children's father whilst care proceedings were ongoing. The final hearing was the week of the 25 June 2018

> and concluded with [the Appellant's then husband] being granted a Child Arrangements Order for the children [and] a plan was drawn up for [the Appellant] to have supervised contact for the foreseeable in a phased manner as she has had very limited contact in the last couple of months with the children and due to the fragility of her mental health.'

57. This was the only information the Respondent relied upon in making its finding in June 2019. Further evidence, as addressed below, has been provided to the Respondent thereafter.

58. In two sets of written late representations made to the Respondent in the period after the barring decision, between July and September 2019, the Appellant:

i. acknowledged that she was not permitted unsupervised access to her children, albeit she expected that to change;

ii. did not specifically deny having made the aforesaid '*comment*' in relation to her children.

59. She stated:

'Firstly it says I threatened to physically harm my children in April 2017 and this was the reason I am being barred for children. I have never threatened to physically harm my children. I do not know where that information came from but it is wholly incorrect and inaccurate. I suffered from postpartum psychosis in 2016 which continued to 2018 and resulted in many hospital admissions but through that time my children still visited me in hospital and I still saw them. There has never been a concern I will physically harm my children. I was acutely unwell for two year and was often psychotic and did not know what I was doing or saying but at no point have I ever hurt my children……Social services agree there is no risk of physical harm to my children and I have asked them to put this in an email to you as part of my appeal….

Secondly, I feel I have been badly discriminated against with regard to my mental health. The decision has been made in June 2019 for an apparent comment that was made two and a half year ago in April 2017. As mentioned I was acutely unwell and vulnerable myself and did not have mental capacity to look after myself never mind my children being in hospital for most of 2016 to 2018. However I recovered in August/September 2018 and was discharged from hospital and have been well and recovered ever since which is now ten months and will soon be a year….'

60. In her second set of written representations to the Respondent, the Appellant said, inter alia, that:

'I had my first child on [2013]. I did not suffer from a post natal illness not even a bit of depression……
….
When he was 20 months old I fell pregnant again, with his sister….
….
After an extremely quick 45 minute labour…my daughter was born. During the labour something snapped. I went from being normal to being mentally ill within minutes. The first thing I said when my daughter was born and handed to me was "that's not my baby, I'm still in labour, don't give me someone else's baby"….

They let us go after 5 hours once I had managed to urinate and that's when things all started to go wrong. For the first week things were ok but by week two I had started to hallucinate and become delusional. I couldn't look at my daughter because I had become convinced she had brown eyes instead of blue (her eyes are blue) and this was a sign she was sent from the devil. Every night once it got dark I believed there were foxes in my garden trying to get into my house to attack me, and I would panic so much my husband would have to lock all the windows and doors and shut all the curtains and blinds so I couldn't see out. Despite feeling like this, I still got up every night and did my daughters night feeds whilst my husband slept... I was absolutely terrified of her, and believed she had been sent by god and the devil to punish me and I was going to die. I would have to put a muslin cloth over the side of her face so I couldn't see her whilst feeding her because I was so scared. But even then, I still did it. I still put my baby first.

When she was 2 weeks I took her to the GP and said "something isn't right, please help me". I explained about the foxes, the fact I thought my house was infested with spiders, the delusions about my daughter being from god and the devil and the fact I was too scared to touch her...

That day I was referred immediately to the mental health team...

The first antipsychotic medication they tried made me like a zombie and I couldn't function, so they tried another one. It started to work but as I started to recover I became extremely depressed and suicidal and said I wanted to die. My care coordinator at the time referred us to social services who got involved. I was semi ok, still a bit delusional but so suicidal and confused and social services eventually said I either go to the mother and baby unit or they will take the kids into foster care...

……
I was discharged from hospital after 9.5 months but the trauma of everything took its toll and the depression was so bad I became acutely suicidal. I just wanted my children but I was hardly seeing them and I had gone from bringing up my son mostly alone to seeing them for 2 hours a week. Social services had taken us to court whilst I was in hospital and I remember absolutely nothing about the court case because I was really poorly still. Apparently, I said some awful things that I don't remember and messed up any chances of getting access to my children because of the way I behaved. The outcome was that my ex husband was awarded a child arrangements order so he had custody of the children and social services would decide how I saw them when I was out of hospital. When discharged I was absolutely devastated and I apparently said I was going to kill myself and take my children with me. I do not remember saying this at all. I certainly never meant it, I wouldn't dream of hurting my children, they are my world, my everything and more. I cannot explain why I said it because I don't remember saying it but I am sure it was just desperation at the situation and saying terrible things because I was in such a bad place myself. I started to try and kill myself, taking regular overdoses and tying ligatures around my neck. In 2017-2018 I had 42 suicide attempts, 5 nearly fatal, one requiring CPR as I went into cardiac arrest and one requiring a stay in intensive care on a life support machine after taking 220 tablets...'.

61. After the Appellant had lodged her appeal against the DBS's barring decision, on 1 October 2020, the County's Children's Services provided a large amount of further evident to the DBS including Child Protection Plans

and Minutes of Child protection conferences. This included an email dated 29 March 2017 from a Mental Health nurse which stated:

'I have just left [the Appellant's] home address where she was at home with her husband. We discussed…and she stated that she does not want to do it as she cannot stand being in the same room as the children especially [Child A] who is 1 year old.

She stated that she wants the children removed from the home and into foster care….

….

I discussed the safety of the children in front of both parents and [she] stated she wants to harm [Child A] by suffocating her or shaking her and wants her dead. I asked her if she feels safe when [her former husband] is around with the children, and not tempted to harm them she has said no.

I put the scenario of [the husband] falling asleep in the chair and [Child A] crying, she could not say she would not get up to cause her harm by suffocation. She stated that she cannot stand the children and want them both to go into care.

[The husband] confronted [her] and informed her that why is she saying these things to me when she knows what action I would take. At this point she smirked and stated she does not want the children and does not care what happens.

……

These children are emotionally neglected on a daily basis…and their needs are clearly not being met, nor are they safe in their own home. This mother does not want the children and wants them to be removed. She states that she hates [Child A] and she says that she will suffocate her.

I feel if something is not done urgently these children will be severely harmed...She is not only telling me how she want sthe children gone she has told other professional all who have grave concerns…'

62. In addition, the 'Adult At Risk' form which was provided in October 2020 put the visit and statements made on 29 March 2017 in context by providing a full reports on contact with the Appellant and Social Services from 2016 onwards:

'6.04.16: Reported she believes [the Appellant's] mental state has deteriorated significantly. [X] reported that last night [the Appellant] reported she had taken an overdose and these she also left both children alone in the house as she could not cope. [The Appellant's] husband was reported to have been out walking the dog at the time.

29.07.16 [the Appellant] has been expressing thoughts about God wanting to kill her baby [Child A], and how these thoughts have surfaced since her recent discharge from [hospital / mental health facility]. It was discussed that both client and husband that they are worried about her thought of God wanting to kill [Child A].

29.07.16….She stated that she did not have thoughts, plans or intent to harm herself or her children. She described a psychotic experience linked to the appearance of "god" who looks like Darth Vader without a clear view of his mask and how he plans to kill her daughter [Child A] which he will make to look like an accident…she believes that she has to stop this at all costs and will constantly check [Child A's]

breathing when she is asleep. She stated that she believes in that god plans to kill [Child A] 100% although she did state that she felt conflicted over believing in god now. She stated that "God" has spoke to her, over one week ago now, telling her to stop taking her medication in order for her to be in more control but that she had not obeyed this command as she knows that "Gods" intentions are wrong as they are to harm [Child A].

1 Feb 2017 – [the Appellant] has written a letter stating why she wants another opinion which she has disclosed that she has terrible intrusive thoughts surrounding [Child A] such as shaking [the child] and hurting [the child]. I explained to her that I would contact children services regarding these thoughts. [The Appellant] stated that she had told me previously about her thoughts however I explained that these thoughts had been around killing herself and not shaking her child.
…….
29.03.17…….[account of the visit described above]
…..
5.11.17 'the Appellant mentioned getting discharged from the ward, getting custody from her children and killing herself. [She] later denied having the intention to harm to herself and her children, stating that she said this out of frustration and anger for having to battle with her ex-partner and social service to gain custody of her children.'

63. The Appellant gave oral evidence during the hearing regarding the Respondent's first finding and was cross examined.

64. She initially stated that which she had set out in her notice of appeal in relation to the hallucinations about her children (see paragraph 12 above). She suggested that she had described her hallucinations as a cry for help in order to safeguard her children so that they would be removed from her. She stated she had no intention to harm them, the very opposite, despite suffering from psychotic delusions she had always protected them.

65. She went on to state that she could not recall making any comments regarding harming her children although she accepted that her memory of events at that time was poor because of her mental state. When pushed, she denied making any of the statements recorded to have been said by the mental health nurse at the visit on 29 March 2017. She stated that the nurse had a grudge against her and she and her former husband had made formal complaints regarding the nurse. She stated her former husband would also deny that she said the things recorded about wanting to physically harm Child A.

66. In an unsolicited email sent on 22 July 2021 after the hearing the Appellant repeated her suggestion that the nurse was lying in making this report.

67. Nonetheless, we are satisfied on the balance of probabilities that the Appellant did say that which she is recorded above as saying by the nurse at the home visit on 29 March 2017 regarding harming Child A. We are satisfied that it is likely Appellant did state on 29 March 2017 that she wanted to cause physical harm to Child A while she was severely mentally ill.

68. We understand how distressing it would be for the Appellant to be confronted by statements made some four years ago regarding her children when she was severely mentally ill and how that is the very opposite of her feelings or intentions when rational and well. It is clear from the reports of 2016 and 2017 that she had varying insights into her symptoms during the period she was unwell and had denied wanting to harm the children even when she was unwell.

69. However, we do not accept the Appellant's evidence that she did not make the statements that she wanted to physically harm Child A for a number of reasons.

70. The first is that the nurse has made a contemporaneous record of events and her memory would have been fresh. She is unlikely to have a motive to significantly misrepresent what the Appellant had told her. This is irrespective of how objective or accurate the nurse's expressed opinions as to the safety of the children, the level of the risk the Appellant posed or her attitude as to whether she liked the Appellant or whether theirs was a good working relationship. The nurse's primary duty in recording these events was one of child protection. Her record was then acted upon as being reliable by the local authority to ensure the local authority and mental health services intervened to protect the Appellant and her children.

71. The second is that the Appellant's husband has never challenged what was being recorded as said or that the Appellant has made similar statements when she was ill.

72. The third is that the Appellant accepts having a poor memory of events at the time because of her illness.

73. The fourth is that the statements made by the Appellant on 29 March 2017 were similar to some others she is recorded to have made in 2016 and 2017 on the Adult Risk Form. While the Appellant's statements of wishing harm were retracted and she denied that she would in fact have caused any harm, we are satisfied that these are a reliable record of what the Appellant said irrespective of her intent.

74. The fifth is that the Appellant's two sets of representations made in June and September 2019 and particularly her appeal grounds of November 2019, closer to the time in question, go some way to accepting that she may have made similar or like statements. However, the Appellant suggests she made the statements when ill and without any intent to carry out the actions described or any intent to cause any other type of harm.

(a) Mistake of Fact

75. Having made the findings of fact above, we must decide whether the DBS's finding that 'in April 2017 [she] made threats to physically harm [her]

children as a result of your mental health issues' is mistaken as a matter of fact.

76. We are satisfied that the evidence proves that as a result of her mental health issues the Appellant stated in March 2017 that she wanted to physically harm Child A. While there is a mistake of fact in the month of the year relied upon (it was not April 2017), this is not material. Likewise, there is another mistake of fact which is not material. The evidence does not satisfy us on the balance of probabilities that the statements regarding physical harm were made about both children but are likely to have been made only about Child A.

77. One of the Appellant's arguments is that when she made statements as a result of her hallucination that God was telling her to kill herself and take her child with her that was not a threat towards her children so the DBS was wrong to use the word 'threats'.

78. It would be possible to have a linguistic debate as to whether the Appellant, in describing the hallucinations she was experiencing, was making statements of her thoughts or feelings rather than making statements with the necessary intent or desire to be described 'threats'. This may involve a question as to the level of intent the Appellant had to carry out what she described when she made the statements and her mental capacity to carry out those intentions at that time.

79. We are not satisfied on the balance of probabilities that the Appellant intended to carry out what she described in March 2017 (or in 2016 for that matter) or that it was likely that she would carry out what she described. However, we are satisfied the Appellant was describing a subjective belief that she was at risk of doing so and objectively this risk was justified.

80. We would not therefore, characterise her statements describing her symptoms as 'threats' – she made statements that she wanted to harm Child A which were made as a result of the mental illness she was suffering at that time.

81. However, again, we are not satisfied that the characterisation of the word 'threats' by the DBS in describing the finding could be characterised as a material mistake of fact on which the decision was based for the purposes of section 4(3). The DBS's primary factual finding was to the effect that the Appellant made statements expressing a wish to harm Child A as a result of mental illness. This was correct and involved no mistake. The characterisation of the statements as 'threats' was one that was reasonably open to the Respondent even if it is not the word we would have used.

82. We are satisfied that when she made the statements, the Appellant was describing what her hallucinations were commanding her to do, that is, harm Child A. We are also satisfied that she did therefore present *a risk* of harm to both Child A & B at that time in 2017, whether that be of acting on

her hallucinations or doing harm to her children in some lesser way whether that be physical, psychological or emotional harm.

83. Therefore, it is without doubt that the local authority's children services and mental health services acted properly in taking action and intervening.

84. The Appellant's evidence is that she would have had no intent to carry out the actions described in her hallucinations or any intent to harm her children. She stated that she was only raising concerns to ensure the children were safeguarded and protected. Her evidence was that not only did she never in fact harm the children physically while in her care, she actively looked after and cared for them despite the hallucination.

85. As above, we accept on the balance of probabilities that when she made the statements describing her hallucinations it was *not likely that she would have carried out the physical harm described.* It is not alleged that she ever did in fact physically harm her children in anyway despite repeating these statements on the occasions set out above in 2016 and 2017. This is to her credit. Likewise, the Appellant did provide necessary care for her children during this time, had varied insight and expressed a desire not to act on the hallucinations.

86. However, we are not satisfied that the Appellant's only motive in describing her hallucinations to the nurse on 29 March 2017 was to protect the children, it was also to remove the children from her presence for her own wellbeing and simply to express the thoughts and feelings she was experiencing.

87. We are therefore satisfied there was no error of fact in the DBS's first finding.

(b) Mistake of Law

88. Paragraph 3 and 4 of Schedule 3 to the Act requires us to consider whether in making the statements we found the Appellant to have made, she engaged in relevant conduct - *conduct which endangered a child or was likely to endanger a child (para 4(1)(a)).*

89. We are not satisfied that the conduct, the statements made by the Appellant, endangered a child or was likely to endanger a child for the purposes of paragraphs 4(2)(a), (b), (d) or (e). The conduct of making the statements did not, nor was likely, to harm the children, cause the children to be harmed, attempt to harm the children nor incite another to harm the children. There is no evidence that the children were present when the statements were made nor that they could have understood the statements given their young age. She took no further actions consistent with her statements.

90. Paragraphs 3 and 4 requires us to focus on the conduct (the making of the statements) and the effect on the children rather than simply whether the

Appellant was at risk of harming her children in some way. This requires an objective assessment of the conduct itself (what would be the actus reus in criminal proceedings) rather than requiring an assessment of the precise form of mens rea or mental state behind the conduct (whether that be intent or recklessness to engage in the conduct etc). However, any finding regarding the mental element may well be relevant to the degree of future risk posed and the appropriateness, rationality or proportionality of the DBS including a person on the list.

91. Mr Webster submitted that all the sub-paragraphs to 4 applied to the Appellant's conduct and in particular paragraph 4(c) because making the statements put the children at risk of harm or was likely to do so.

92. There are arguments that undermine his case.

93. First, as the Appellant argues, she made the statements to draw the authorities' attention to the risk she posed and to protect her children. We have accepted that this was *part* of her motivation, but we have also found she was also making statements that would enable her not to have to look after them anymore as well as to voice the hallucinations, commands or desires that were present in her mind. We have also found that in making the statements she was expressing her belief at that time, objectively justified, that she presented a risk of harm to her children.

94. Second, it can be argued that the conduct itself, making the statements, did not put the children at risk of harm. It might be argued that the Appellant herself presented a risk of harming her children in some way at that time because of her mental state and the nature of the hallucinations and symptoms she was experiencing. However, this was not as a result of her describing the hallucinations and voicing the statements that she wanted to harm Child A. The conduct itself did not put the children at risk of harm – it was her mental state that did.

95. While this is a finely balanced decision, on balance we are satisfied that in making the statements, the Appellant was engaging in conduct putting Child A at risk of harm.

96. First the statements evidenced the Appellant's mental state and behaviour ('behaviour' being the title to paragraphs 3 & 4 of schedule 3) which was at risk of causing harm to Child A or both her children (whether that be some form of physical, emotional or psychological harm). This is a matter of objective assessment rather than deciding the Appellant's subjective desire or intents.

97. Second in making the statements, the Appellant expressed the risk she was presenting, and further her temporary wish at that time to harm Child A, even though at the same time she may have hoped and desired that the children would be removed from her and even thought she later denied

any intent to harm Child A. She could not know whether the children would be immediately or permanently removed from her care at the time she made the statements.

98. While the statements were of a time limited nature, they were a repeat of similar statements made and then retracted or denied in 2016 and 2017 as recorded on the Adult Risk form while she was still acutely mentally ill.

99. We are satisfied, although there is no finding by the DBS, that this was not a one-off instance but a continued experience of the Appellant while she was acutely mentally ill in 2016 and 2017, even though she also repeatedly denied that she would act on the hallucinations and she did not do so during this time.

100. In expressing a wish or desire to physically harm Child A while mentally ill the Appellant put a child at risk of (some form of) harm as she expressed a risk that she might act on her desire and cause some form of harm to the child (whether psychological, emotional or physical). While we have not found it likely that she would have caused physical harm in the manner described, and she did not do so at any time, the Appellant demonstrated she might put the child at risk of some form of harm.

101. We are therefore satisfied on the balance of probabilities that the Appellant's conduct of making statements of wanting to harm Child A was likely to endanger a child by putting Child A at risk of some form of harm by her. Therefore, it was relevant conduct for the purposes of paragraphs 3 and 4 of Schedule 3 to the Act. There was no error of law in this regard.

102. We should emphasise that this is a fact specific finding in light of all the background in 2016 and it is not to be taken as any precedent that simply making a statement or expressing desire to harm when mentally ill will necessarily amount to relevant conduct.

103. However, even if we had found that the conduct itself could not be categorised as 'relevant conduct' for the purposes of paragraphs 3 and 4 of Schedule 3, that would not prevent the Appellant from being included on the CBL. The Appellant could have been included on the CBL in June 2019 even though there was a material error of law in finding her behaviour constituted relevant conduct for the purposes of paragraph 4(1)(a) and 4(2) of Schedule 3.

104. First, given our findings above and below, the Appellant would have fallen within paragraph 5(4) of Schedule 3 in that at the relevant time in 2017, and at the time of the original decision 2019 , because she may have put her own or other children at risk of harm (of some form) on the basis of the facts we have found. For the reasons we set out below in relation to risk and proportionality at the time she was barred in June 2019, she may have put children at risk of harm such that she might have been included in the CBL under paragraph 5(3) of Schedule 3.

105. Second, given our finding that the DBS made no mistake of fact nor law in deciding the Appellant committed relevant conduct in relation to vulnerable adults, as is set out below, that conduct, if repeated in relation to children, would be capable of constituting relevant conduct in relation to children for the purposes of inclusion in the CBL under paragraph 4(1)(b) of Schedule 3.

106. We have concluded there was no mistake of law in the DBS making its first finding of relevant conduct.

Finding 2 - In November 2017 [the Appellant] gave antihistamine tablets to other patients whilst [she was] also an in-patient in a mental health facility. This resulted in all of [them] being taken to hospital

107. This finding of relevant conduct by the DBS can be taken much more briefly because, in effect, the Appellant accepts it.

108. The Respondent found that in November 2017 the Appellant gave antihistamine tablets to other patients whilst she was also an in-patient in a mental health facility which resulted in them all being taken to hospital.

109. The Appellant argues that bringing a packet of promethazine to the ward and sharing them with two other patients did not amount to an attempt to intentionally harm two vulnerable adults. However, it should be noted that the Respondent did not conclude that the Appellant did so with a view to intentionally harming the other patients (and nor was the Respondent required to make such a finding).

110. The Respondent's decision was predicated upon the following (inter alia).

111. In the Appellant's written request to be allowed to make late representations to the Respondent in 2019, she said that:

'Vulnerable myself and not in my right frame of mind I was asked and encouraged by other patients to buy some antihistamines and share them for recreational purposes. Feeling pressured and not thinking straight myself due to my own mental health illness I agreed to do it however this was never a deliberate attempt at harming other vulnerable adults and I did not have the mental capacity at the time to knowingly decide to harm another person. Like I stated I was vulnerable myself and was sectioned and I should never have agreed to do it but it was absolutely not a malicious attempt at harm but simply a vulnerable individual making a stupid mistake that I continue to regret even now.
Fortunately no harm came to anyone involved and no action was taken against me in any way...'

112. In her representations to the Respondent, the Appellant said, inter alia, that:

'... I started to recover and was sent back to the ward and was given 30 minutes leave off the ward per day to go for a walk and to get used to being outside the ward

again. It was at this point, when I was still very unwell but not acutely psychotic, that I was asked if during my leave I could go to the pharmacy and buy promethazine for some other patients who wanted to get high on it. I foolishly agreed to and took their money and bought some. I brought it back to the ward and they asked me to join them so I did. We all took about 20 each and it sent me back into psychosis and I had to go to A&E, and the others were sent there as a precaution...

I was absolutely not trying to hurt the other patients. I did buy the promethazine but not with my money, it was theirs. It was their idea and as I said I feel they used me because I had leave and they didn't. I would never had done it if I was of sound mind, if someone asked me to it today I would 100% say no. I wasn't thinking straight and I still didn't have full mental capacity, I was on a lot of medications and I was still recovering myself... It was a huge mistake, and one I would never repeat now I am actually recovered.'

113. Information held by the police dated 6 September 2018 regarding the incident stated:

'On 21st November 2017 it is recorded that [the Appellant] provided promethazine, a freely available antihistamine drug, to two other in-patients within a mental health facility in what appeared to be a suicide pact. [The Appellant] and the two other patients took approximately 10 tables each. All three patients, including the applicant, were subsequently taken to hospital. This incident is currently under investigation by …. NHS Foundation Trust and 'the Appellant' has sustained invariably to clinicians that she and her peers has engaged in such behaviour merely for recreational purpose rather than with suicidal determination.'

114. The Appellant in her oral evidence maintained the account she set out in her appeal grounds above. She stated that she obtained the promethazine on request by the others while on her first unescorted leave from the ward and that the intention was all for them to become psychotic (or 'get high'). There was no intention to cause anyone any harm, the others were not subject to any hospital treatment and she regretted the incident. She would never repeat such behaviour but it only occurred because she was mentally unwell in the way she was no longer.

115. As the Respondent submits, we are satisfied that it made no material factual error in the terms alleged as regards the finding of relevant conduct. There was no finding that the Appellant intended to cause any other person harm or that her conduct was 'deliberate' (suggesting such an intention). We are satisfied that it was deliberate in the sense she intended to obtain, supply and take the promethazine with the purpose of inducing psychosis while she and the other were at an in-patient mental health facility.

116. Likewise, we are satisfied that there was no error of law in the factual finding constituting relevant conduct. The Appellant put herself and the other patients, all vulnerable adults, at risk of harm, whether physical, emotional or psychological, by supplying multiple tables of the promethazine, that risk of harm being manifested by the admittance to hospital.

Mistake of Law – procedural irregularity and ongoing paragraph 18A review

117. In its submissions regarding the grant of permission to appeal on 28 August 2020 (before receipt of the material from Children's Services from between October 2020 and May 2021, the Respondent's legal advisor submitted:

> 'One of the grounds raised by the Applicant was that the Respondent had erred in retaining her name in the lists absent any evidence form professional as to the possibility of a relapse. Having examined the matter in light of the application, the Respondent considered that although the Applicant was asked to provide relevant information from professional to support her representations and failed to do so, it may have been beneficial, given the limited information before the Respondent at the time of the barring decision and circumstance of this particular case, for the Respondent to make further attempts to obtain medical information as to the Applicant's mental health disorder, the possibility of relapse or escalation in her behaviour, and any risk that may be presented to vulnerable groups should any relapse occur before a final barring decision was made. It was also open to the Respondent to utilise the provisions of the Safeguarding Vulnerable Groups Act 2006 in order to obtain relevant and up to date information from social services…..With this in mind the Respondent accepts that permission to appeal may well be granted by the Upper Tribunal on the limited basis that it is arguable that the Respondent, given the particular circumstance of this case, erred in failing to take into account relevant professional evidence when evaluating the current risk that the Applicant presents to vulnerable groups.'

118. We are satisfied that the Respondent erred in law in failing to obtain the relevant professional evidence when evaluating the Appellant's then current risk to vulnerable groups and risk of relapse when making its decision in June 2019. Even if medical evidence could not be obtained without the Appellant's consent, and the Respondent did make steps to obtain such consent which the Appellant did not provide, it had independent powers to obtain material from Social Services which it did not use.

119. In the circumstances of this case, given the very limited other information available to the DBS in June 2019 and the absence of the Appellant's representations, we are satisfied it was a procedural error for the DBS not to obtain Social Services' material (which also included medical evidence). This would have further informed its decision on the future risk the Appellant posed to vulnerable groups. The Appellant's mental illness and interaction with her own children and Social Services was highly relevant evidence to the risk assessment the DBS was carrying out when deciding whether the Appellant should be included in the barring lists.

120. Again, this is very much a fact specific decision and not a precedent that it will always constitute an error of law for DBS not to obtain all potential material before making a decision. The DBS is subject to the usual public law principles to make a reasonable search, and in good conscious obtain reasonably relevant evidence before making its decision.

This will include obtaining any material that might reasonably undermine its case and considering its weight.

121. We note the Respondent is presently concluding a review of its own initiative and deciding whether to remove the Appellant from the lists pursuant to paragraph 18A of Schedule 3. This was precipitated by its own admission that it did not independently seek up to date medical and/or social services information when it issued the Final Decision Letter on 18 June 2019.

122. The review was initiated on 23 January 2020 when the DBS wrote to state that potential errors had been identified within the decision. The Respondent will consider whether it continues to be appropriate for the Appellant to be included in the list based on the information it did not have in June 2019 and the Appellant's change of circumstances at the time when the review is concluded. Whether the Appellant poses a continued risk of harm to children or adults at present is not a matter we will come to any conclusions upon as part of this appeal. That is a matter which the Respondent will likely make findings upon when it decides whether to remove the Appellant from the lists in its review conducted under paragraph 18A of Schedule 3.

123. On 18 May 2021 the DBS wrote to the Tribunal and stated that relevant information had been provided by Social Services on 10 May 2021 in an accessible format, but that it would now consider all the information that it holds and if it continues to decide it is appropriate for the Appellant to remain on the lists then she will be notified in writing and given an 8-week time period within which to make representations against this decision and thereafter the DBS will make a final decision.

124. Judge Jones previously refused to stay the hearing of this appeal pending the conclusion of that review which has been ongoing for 18 months and the DBS had failed to conclude that review by the end of June 2021, although it relies on the suggestion that the Appellant has failed to assist the process of obtaining information.

125. We examine below the documentation subsequently provided to DBS and the Tribunal from Social Services following June 2019 which evidences the risk of harm the Appellant posed to vulnerable groups in June 2019.

126. In light of that evidence, we are satisfied that the DBS's error of law in failing to obtain the Social Services evidence before making its decision in June 2019 is not material. It is apparent from the information subsequently obtained from social services in October 2020 onwards that the Appellant presented a risk of harm to vulnerable groups as at June 2019. We set out our reasons and findings on this below.

127. Mr Webster submitted that, if anything, the additional medical and social services evidence, now obtained, strengthens the Respondent's case on risk. He submitted that it buttresses the concerns expressed by the local authority as to the Appellant having unsupervised contact with children.

128. We accept this argument. We are satisfied that it is inevitable that the DBS would have made the same decision in June 2019 if it had obtained the Social Services evidence that is now available to us.

129. We are therefore satisfied that the DBS's error of law in not obtaining the evidence at the relevant date was not a material error of law.

Proportionality – error of law?

130. We are satisfied that the correct approach when assessing the proportionality of the barring decision is to decide afresh whether it was proportionate for the DBS to include the Appellant on the CBL and ABL in June 2019. In doing so we will consider whether there was an error of law in the DBS' decision to include the Appellant in the barred lists as at June 2019 on the basis that it was not disproportionate to do so.

131. Determining proportionality primarily involves determining whether the Appellant posed a continued risk of harm to children and /or vulnerable adults at that time of inclusion on the lists. However, it also involves taking into account the impact of the Appellant on the barring decision and answering the four questions set out in *Aguilar Quila*. In doing so we afford weight to DBS' view of risk given its expertise as acknowledged in *ISA v SB* but we will decide independently whether there was an error of law in finding it proportionate to include her on the lists.

132. In assessing whether there was an error of law in relation to proportionality in June 2019, we can have regard to the material available at the time of the decision and the material which might have been available, because it existed at the time and is now available to us.

133. As will become clear, we have heard evidence in relation to subsequent events, in particular an incident in September 2020 where the Appellant took cocaine suffered psychosis and was admitted to hospital. We have also received the section 37 reports of the Children's Services in September and November 2020 recommending supervised contact with her children. Therefore, our approach to this subsequent evidence is simply as a check against the decision made in June 2019. We are not using hindsight to assess proportionality as at June 2019. However, there would be an element of unreality not to admit evidence and take into account the fact that subsequent events have supported the risk assessment made by the DBS in June 2019.

134. Nonetheless, we are not making a decision as to whether there is an error of law in the Appellant remaining on the list as at the date of hearing

in 2021 but only at the time of her inclusion in 2019. The ongoing review will address the current circumstances.

135. We are not conducting a review of proportionality of inclusion as of date of this appeal for two reasons: a) because that is not what statute permits us to do – only to consider mistakes of law, hence the proportionality assessment – as of the date of inclusion on the lists; and b) in any event, there is an outstanding paragraph 18A, Schedule 3 review ongoing. The outcome of that review has yet to be notified to the Appellant, thereafter she will have 8 weeks to make representations and will have a separate right of appeal against that decision. We therefore do not comment on that process.

Proportionality as at June 2019 – evidence available at the time of the decision and now

136. It was apparent that as at June 2019 the DBS had considered a number of factors in relation to the proportionality of including the Appellant on both barring lists. Its structured judgment process was set out in detail at the time in the Barring Decision process document.

137. The Respondent took into account the allegations regarding the Appellant's own children, which resulted in her children being placed on a child protection plan; and contacting the ambulance service but not accepting any assistance when they arrived. It also took into account the triggers to the Appellant's condition being difficulty tolerating stress. It did acknowledge that the Appellant had by that time overcome her postnatal psychosis however her behaviour had continued to deteriorate due to additional mental health issues. While this was not necessarily directed towards vulnerable groups it added weight to the concerns that she would not be able to act appropriately if employed in regulated activity. This was supported by the most recent information available as at June 2019 that the Appellant was not allowed unsupervised access to her own children. This added weight to the assessment that she was still at risk of causing harm, whether that be emotional, psychological or physical harm to her children.

138. The DBS's decision on proportionality was set out in its Final decision letter of June 2019 which is quoted at paragraph 9 above.

139. However, we are also entitled to take into account the subsequent material which was not relied upon or available at the time but still relates to the time the Respondent made the decision. The DBS considered the Appellant's late representations of July and September 2019.

140. These included the positive statements as to why the Appellant was no longer at risk, some of which we have already considered above. She explained that she was currently undergoing supervised access to her children and that she was taking a parenting assessment with the aim of

getting unsupervised access. She explained she was released from the mental health facility in October 2018 and she was stable. Records suggests she was admitted and sectioned under section 3 of the Mental Health Act between 4 August 2017 and 24 April 2018 having previously been admitted in October to November 2016 and December 2016 to January 2017.

141. The Appellant accepted she was addicted to cannabis, cocaine and diazepam and had spent three months 'off my face' but thereafter (from January 2019) she saw her children and their reaction caused her to realise that everything needed to change so she decided to stop taking drugs and referred herself to the drugs and alcohol service who she was currently working with to turn her life around. There was reference to a 7 June 2019 visit where she had discussed a 3-day cocaine binge due to not seeing her children.

142. The DBS took all these matters into account but decided it was still proportionate to include the Appellant in the list for the reasons which are summarised in its letter of 1 October 2019, set out at paragraph 10 above.

143. In essence, this was that the Appellant had relapsed and recovered but had only been stable for a relatively short period of time and was still not permitted unsupervised access to her children.

144. The evidence and information subsequently supplied by the Local Authority's children's services after October 2020 included medical evidence.

145. There were references to the Appellant's continued cocaine use in February and July 2019 (which had been increased for the past four weeks due to stress from Social Services and failing her recent parenting assessment). There was also reference to the Appellant's key worker stating that she remained a significant risk of dying due to her high levels of cocaine use which had been the prompt to make her decide to get clean.

146. The Appellant had been diagnosed by her consultant psychiatrist with a personality disorder in April 2018. It was said to be mixed personality disorder, 'predominantly with emotionally unstable personality traits (impulsive type) with dissocial, obsessive compulsive and narcissistic traits.' There was also a current episode of Moderate Depressive Disorder which was then in remission.

147. At that time the conditions were said give rise to a chronic risk of poor therapeutic engagement, planned acts of self harm particularly during periods of stress and conflict. Regarding the pseudo-psychotic phenomena that the Appellant expressed – the psychiatrist stated that 'these remained highly variable in terms of the perceptual disturbances expressed in the absence of dissociative, affective or behaviour symptoms

with nil other positive symptoms ie. thought disorder which would be expected given her account of other experiences'.

148. As of 26 June 2018 the Appellant was said to be at 'ongoing and high risk of iatrogenic harm and the ongoing personality traits and perceptions of stress and conflict will likely always give rise to a chronic risk of poor therapeutic engagement impulsive and planned acts of self harm and harm to interpersonal relationships'. There was 'no current pseudo psychotic phenomena elicited but it remained a chronic risk.'

149. Throughout the latter half of 2019 there was continuing interaction with treatment services, references to the Appellant continuing to feel suicidal and a risk of self harm during stress. As of October 2019, the Appellant had reported that she had not used cocaine for the past month. It was also reported that she continued to reject the diagnoses of personality disorder and this had made it difficult to provide her with appropriate treatment. She had requested a change of doctor. There were later references to the Appellant suffering continued difficulties in November 2019 with her mental health, including suicidal ideation and self harm.

150. The Appellant was still having supervised contact throughout 2019 and fortnightly in April 2020. On 19 June 2019 the Child and family Assessment conducted by the Local authority recommended the ongoing arrangement of the children being placed in their father's sole care while working towards a more consistent pattern of contact with the Appellant. The plan was said to be going well with her having daily contact (supervised by their father), however when the Appellant was unwell she did not see them. There was no unsupervised contact at that time. The Children Services supported a supervision order and child in need plan.

151. An assessment of the Appellant's parenting capacity as at 16 August 2019 concluded the Appellant's mental health remained one of the primary concerns which would impact on her emotional availability and would compromise the children's physical safety in her care. The Appellant was said to need psychological support including CBT and psychotherapy. It concluded she had not made sufficient changes over a longer period of time to support a plan to move to unsupervised contact at that time. This view was fully supported by the children's father who expressed concerns about the stability of her mental health and increased drug misuse.

152. We accept all the evidence above as being reliable as a matter of fact and being a reliable assessment of the risk the Appellant posed to herself and others at these times.

Events subsequent to June 2019

153. On 20 August 2020 the Appellant's consultant psychiatrist wrote to the DBS to answer a number of questions posed in its letter dated 10 March 2020. He stated that she was currently undergoing an assessment with their team clinical psychologist with a view to consider psychological

treatment. He stated that the Appellant had a primary diagnosis of 'Personality Disorder (Not otherwise specified)'. She also had a history of cocaine misuse, puerperal psychosis and anorexia nervosa. She had her diagnosis of personality disorder confirmed following an extended assessment by the complex needs service. However, the Appellant disputed the diagnosis.

154. The psychiatrist was asked by the DBS whether when mentally unwell in the past the Appellant presented a risk of harm to children and / or vulnerable adults, including her own children. The consultant psychiatrist stated that when unwell in 2016 the Appellant experienced beliefs that God had planned to kill Child A but she had to prevent this from happening. In March 2017 the Appellant disclosed to staff at the time that she could not stand the children and wanted them to go in to care. She currently had supervised access to the children and was seeking unsupervised access via the Court.

155. The psychiatrist, perhaps out of concern for his ongoing therapeutic relationship did not however answer the DBS's question.

156. He was asked if the Appellant was to experience a relapse in her mental health state she would pose a risk of harm to others and more specifically children and / or vulnerable adults in a regulated activity setting. He stated that she could present a risk to children or vulnerable adults if she were to experience a relapse in her psychotic illness. However, he stated that 'given this illness has predominantly taken place in the postnatal period and has been stable since 2016 the likelihood of a full relapse without appropriate intervention to treat it at the time is low'. This was as of the date of his letter in August 2020.

157. He went on to state that the Appellant's admission to hospital in recent years had been related to the variable mood states and impulsivity as part of her personality disorder and the presented risks to herself rather than to others. While the Appellant had at the time felt that her children might be better off without her she had had no recent thoughts of harming them in any way.

158. A month after the psychiatrist wrote the letter, between 19 and 21 September 2020 the Appellant was admitted to a mental health facility. A mental health assessment concluded that she was psychotic and did not have capacity to consent. She was admitted under section 2 of the Mental Health Act.

159. The Appellant acknowledged that it was 2 gm of cocaine that caused the psychotic episode. She advised that she had a further 8 gm at home which she intended to use before children arrived some days later. She had also been diagnosed with cocaine induced nasal destructive lesion. She was discharged from pain services on 29 September 2020.

160. We considered other evidence regarding the Appellant as apparent from the papers. Previously she had tested negative for all drugs on July 2019 but positive for opiates and negative in November 2019 and August 2020. She had been discharged from drug and alcohol services for that reason.

161. As of October 2020, the community mental health continued to care for her. The doctor with responsibility stated her mental health had been better than the previous last four years but not in an ideal state, particularly given her recent admission for a drug induce psychotic episode. She had presented as confused on 2 October 2020 but this may have been a result of a fit, and she had experienced seizures in the past. At that date the doctor had not felt confident in the Appellan'ts ability to have unsupervised contact because he would not feel fully confident in her ability at that stage not to pose a risk to her children.

162. On 13 October 2020 and 23 November 2020 the County Council's Children's Services provided two reports to the Family Court totalling 88 pages under section 37 of the Children Act 1989 in relation to the Appellant's children. They were prepared by a Social worker with input from each of the medical and other services the Appellant had been in contact with or under supervision of. Both reports recommended that the Appellant's application for unsupervised contact should not succeed at that point in time given the historical and current concerns as evidenced throughout the reports.

163. The reports highlighted that the Appellant had made progress however she had disputed telling a medical professional that she had admitted continual cocaine use until very recently. The author remained curious as to the Appellant's inability to understand her own propensity to tell professionals she was still using cocaine and her inability to acknowledge that she had told medical and mental health professionals untruths about cocaine. The reports also noted that she had minimised her most recent hospital admission by saying it was caused by smoking cannabis with no mention of cocaine which evidenced a level of dishonesty. Her diagnoses of chronic pain remained and she was receiving medical treatment for it.

164. The Appellant's supervising doctor was recorded as stating that despite her physical issues she had only been admitted to hospital with a psychotic episode once over the previous two years and she reported a reduction in cocaine use. The Appellant had sent varying professionals unhelpful emails at unsociable times in order to evidence her good mental health.

165. The reports concluded that the Appellant would benefit from prioritising her own physical and mental health currently and that the children should not be used a tool to promote her emotional stability. The former husband had positively promoted the children's relationship with the Appellant for a long time.

166. Again, we find these reports from October and November 2020 to be reliable.

167. The Appellant's application for unsupervised contact was heard by the family court in January 2021. On 25 January 2021 the same social worker who wrote the reports stated that her reports and the judge's remarks noted the sheer amount of positive progress that was made by the Appellant. She stated in an email:

> 'It was felt at this time that [the Appellant] should still not have unsupervised contact with her children. The order was relaxed to support (by flatmate) family time with her children to be reviewed over a period of time. For example, [she] is able to have the children on her own while her flatmate is at the shops or walking the dog for up to an hour. [She] will collect the children from school a...Wednesday and Thursday and keep them until dad collects at 6ish. [She] will also have the children alternate weekends. The condition of the afore mentioned arrangements is discretionary and based on mum being in good health. It was felt that dad can manage this.
>
> [She] had a relapse in the form of a drug induced psychosis at the end of September and it was my opinion that before recommending that [she] has unsupervised time with her children that there should be no such incidents for a prolonged period of time.
>
> Also the judge ordered that Children's Services hold a Child in Need meeting for mum, dad and all professionals to attend…..This meeting has since taken place and the case is closed to Children's Services as it is our opinion that the children are thriving in father's care and he is able to safeguard them from any harm'.

168. This email made clear that while the Local authority had recommended no unsupervised contact, the court had ordered that the Appellant could have some unsupervised contact and also had contact which was supervised but not by her former husband. It was also clear that Children's services were no longer involved in the case because the former husband had parental responsibility.

169. The Appellant also presented us with a letter dated 9 July 2021 from her consultant psychiatrist to her for consideration by the DBS. It stated, inter alia, the following:

> 'Since my last update, you have continued with your recovery, you have not had any further admissions to a psychiatric hospital nor received treatment under the Crisis Team. Your last reported use of illicit substances was prior to your admission on 19th September 2020. You have reported consistent improvement in your mood, with no significant periods of depression or psychotic symptoms. You have denied any self-harm or suicidal thinking and have confirmed you take your medication regularly which you have said have made "a huge difference" to your stability. You continue to be supported under the Care Programme Approach (CPA) with a Care Coordinator. If you progress is maintained, we will review your request to be discharged from CPA.
>
> I am pleased with your positivity about your future and are now considering employment opportunities. As many of these options require DBS I feel your

sustained recovery from your mental health problems would be benefited in being able to move into employment. I know you have worked with Children's Services and now have your children staying with you Wednesday to Friday each week, and Friday to Sunday every other week.'

170. We note that this letter from the consultant psychiatrist sets out self-reporting from the Appellant on her drug use rather independent evidence. It accepts that treatment is ongoing but further treatment is still required. While it does say that the Appellant would be able to move into employment – and her recovery would benefit from it - it does not say what type of employment. Further, it says nothing about whether the Appellant poses a risk to children or vulnerable adults if working in regulated activity.

171. We are satisfied this letter did not take us a greater deal further forward – it did not really grapple with the issues to enough depth and rigour to be of great assistance.

172. Most importantly, in any event, the Tribunal is not tasked with assessing the Appellant's risk of harm to vulnerable groups as at the date of the hearing nor the proportionality of her remaining on the list at the current time. That is all to be addressed in the ongoing review by the DBS. We are concerned with the proportionality of the decision to include her on the lists in June 2019.

The Appellant's oral evidence on proportionality

173. The Appellant gave evidence about the proportionality of her being included on the barring lists and remaining upon them at the current time.

174. She stated that it was disproportionate for her to remain on the list given that she had fully recovered from mental illness which took place between 2016 and 2018. She had now had three years since that time and recovered from it and worked very hard. She stated she was back to how she was before she became ill during the post-natal period – when she was working with local government and ambulance service. She was now well even though she had previously been unwell. She believed it was disproportionate to bar her for 10 years because of something that happened three years before when she was unwell. She believed DBS was using her mental health illness to discriminate against her.

175. She believed she had an informal joint custody arrangement in respect of the children and had agreed to co-parent them with her former husband. She now had care of the children every Wednesday to Friday and every other weekend. This was unsupervised at her house. This had been happening for about 6 months since the last court hearing on 25 January 2021. She stated that the children loved having two houses. She and her former husband believed both children were settled and calm and both thriving. She and her former husband were working together.

176. She gave an explanation for the events of September 2020. She stated she continued to be suffering from generalised pain disorder and no analgesic had worked to ease the pain in her throat and soft palate. She had no painkillers and was moaning and her lodger's friend suggested she try cannabis to help with pain as she had tried everything else and it had not worked. She believed she took two pulls on a joint and went psychotic. It went to her head and made her unwell. She said she was sectioned for one day and came round and apologised and became well. She will be keeping away from drugs from now on and had done since September 2020.

177. She stated she has a degree in forensic science and would like to teach at middle school level and look at secondary school biology teaching. She had to accept that she could no longer work as an ambulance technician because physically she was not well enough to do it anymore. She would like to be able to work teaching and engage in people participation for the mental health trust. She had spoken about joining interview panels for recruiting new staff. In order to work in these regulated activities she needed not to be included in the DBS barred lists. She was stuck at home bored.

178. In terms of her reaction to future stress, she had endured a lot of stress and she believed she had dealt with all that. She continued to take antidepressants and anti-psychotics and spent time with her children because that grounded her and makes her feel better. She was fighting this case for her children and for herself. She had been well since at least January 2019 and did not receive any psychotherapy of any kind.

179. She remained under the care of the community mental health team in the Care Programme Approach and meets with a community psychiatric nurse on a regular basis by phone. She stated she was going to be discharged from the CPA and revert to a twice a year care coordinator but she was staying under CPA a little bit longer because of all the physical problems she suffered. She would like a care coordinator on the end of the phone should she need them, although she did not really.

180. On 24 of July 2021 she was due have to have a meeting and it was her expectation she will be discharged from CPA and just become an outpatient of her consultant psychiatrist and see him in clinic once or twice a year. She would discuss tapering down her medication at that stage but did not know over what period it would take place.

181. She agreed that she had been suffering from post partum psychosis – she agreed with that diagnosis following her labour. She had not yet started tapering down the dose of her antipsychotic medication because things were going well – and she wanted to keep it that way. She accepted there was a 50% chance of a postpartum psychosis were she to be become pregnant again but she would be monitored very closely around the time of any birth and a few days following birth. She was open

to possibility of a further pregnancy but she was concentrating on the two children she already had.

182. She continued to disagree with her 2018 diagnosis of personality disorder. A different doctor had that it was a schizo-affective disorder but her consultant psychiatrist had diagnosed personality disorder. She had to accept this as she was not medically qualified but did not agree with it. She believed her issues were with hallucination and depression.

183. She never had any psychological work or therapy – she had an assessment by the psychological team in 2020 and they offered her a trauma group to join which might have led to trauma therapy. She thought about this and then weighed it up but decided right now was not the right time. She decided it might be triggering and she needed to be ready for it but when she had cleared the DBS and family proceedings she might be. She said the professionals understood her decision that she did not need trauma group and it was only to address trauma – not her personality disorder.

184. The Appellant stated she was going back in August 2021 to obtain official joint custody of the children from the Family Court. Since the November 2020 section 37 report and since 25 January 2021 hearing she had had nothing to do with the local authority. The local authority will provide its view in the next few months because she had been asked to write a statement on next few weeks regarding her joint custody hearing in August 2021.

185. She accepted she was receiving the highest level of disability benefit (Personal Independence Payment) for her physical and mental health functioning and Employment Support Allowance (capability for work) benefits as she scored highly for physical and mental health descriptors. However, it had been awarded in 2020 and it will be reviewed again in 2024. She would like to be able to work part time – 15 hours a week – in order to afford to keep her home. She was facing losing her house and had a large mortgage to pay and she struggled to do so.

186. She had recently had one round of chemotherapy but was awaiting further rounds to fix a problem with her physical health. This would not stop her teaching. She was waiting to have her eggs frozen after chemo was complete.

187. She had undertaken a trial job at a supermarket but could not continue due to her physical health and the trial lasted about 3 weeks. She had not sought work in any other areas but she had applied for about 500 jobs. Her experience tends to be part time work in public sector in NHS or local government so her experience did not fit with the private sector and the physical restrictions stop her from some working as she cannot stand up for long periods.

188. She continued to believe she had been discriminated against because she had been barred when mentally ill – the barring was based on when she had no capacity. She was now well.

189. She believed that the least intrusive option would be an entry and section on her DBS certificate regarding her mental health. This would be adequate to cause any employer to be informed as to her diagnosis and let them make their own decision whether to employ her and how to manage her.

190. She stated that it was important to mention that the consultant psychiatrist that stated that she had been a risk to herself and not to others had also said that the risk of relapse was low.

191. For these reasons she did not understand why she had been barred for 10 years. She was not a risk to others and only a risk to herself in the limited time while she was unwell and had limited capacity.

DBS's submissions

192. Mr Webster made the following submissions both on the proportionality of the barring decision in June 2019 and the Appellant remaining on the list at the current time.

193. He submitted that the Appellant's relevant conduct as found by the DBS – both the threats to children and provision of medication to vulnerable adults – were rightly considered by the DBS to be serious issues even though they were the consequence of the Appellant's ill mental health arising postnatally.

194. When it comes to assessing risk of harm posed by the Appellant to vulnerable groups, he submitted that the Tribunal needs to take a cautious approach in light of the following factors:

a) The Appellant had not acknowledged her personality disorder diagnosis:
b) The treatment from mental health professionals was ongoing in June 2019 and is still the case;
c) There was evidence of relatively recent drug use in September 2020 and the Appellant had a propensity to use drugs, particularly in the context of stress;
d) There was a history of drug use by the Appellant in triggering psychosis;
e) The Appellant had refused to engage with psychotherapy;
f) There were concerns about the Appellant's tendency to mislead professionals;
g) The local authority had opposed and continued to be concerned about supporting about unsupervised contact with the Appellant's own children;

h) The consultant psychiatrist's recent reports from August 2020 and July 2021 were equivocal at best.

195. In light of the risk of harm the Appellant had historically posed she continued to present a risk. The evidence was that the Appellant was not fully recovered from all aspects of her mental disorder and that there is a recommended treatment – trauma therapy - which the Appellant has yet to undergo and even if she has a good reason not to do so, the fact is that it is untreated.

196. In relation to the antipsychotic medication required to be taken to avoid risk or relapse – acknowledging the Appellant's evidence - there was no corroborative evidence from her doctors that the Appellant's medication would be tapered down or if so, over what period of time.

197. Mr Webster submitted that while the consultant psychiatrist acknowledged that 'the risk of full relapse without appropriate intervention to treat it at the time is low' – this was as of 20 August 2020 and not June 2019. There was a subsequent drug induced psychosis in September 2020. No one could know what 'low' meant – it was not negligible and given the risk at stake and the ambiguous evidence from the consultant psychiatrist, the DBS was right to treat this evidence with care. He submitted that even when the consultant psychiatrist wrote a letter in July 2021 it was a fairly equivocal letter which did not take matters a great deal further – particularly in relation to risk.

198. He also submitted that in terms of the Local Authority's position, the updated position was that their intervention has come to an end as at the time of the care proceedings since January 2021. However, they had never accepted that it was appropriate for the Appellant to have unsupervised contact with her own children– the most up to date view was that they were against unsupervised contact.

199. As for the actual impact of the bar, the Appellant is about to commence further cycles of chemotherapy and for an unknown period. In relation to her physical health, she was not in a position to work in any capacity at the very so the bar is not having an impact on her ability to work. Even if the Appellant were physically capable of work she could do so in unregulated activity – in public or private sector. There were multiple avenues for her to pursue for employment. Even if the Appellant could not work in unregulated activity it would still be a proportionate measure to include her on both lists.

200. While the bar is for a 10 year period, Mr Webster submitted that there is an ongoing paragraph 18A, Schedule 3 review for which the result is awaited and the Appellant can ask for a further review by the DBS if circumstances change.

201. For example, if medical evidence states that the Appellant presents virtually no risk to children and / or adults and the Appellant completes

chemotherapy then this may be a relevant change of circumstances. However, currently the Appellant was effectively admitting she could not work and that she had only been looking to work up to 15 hours per week. The proportionality of bar has to be assessed in that context. There were many unknowns at present.

Conclusions on proportionality

202. We are satisfied that the decision to include the Appellant in both lists as at June 2019 was proportionate – or put in another way – the DBS's decision to include her on both lists at that time was not disproportionate. There is no error of law in this conclusion.

203. We are satisfied that the reasons given by the DBS in its decision letters of 18 June 2019 and 1 October 2019 (as set out at paragraph 9 and 10) are rational and reasonable. Inclusion on both lists satisfies the four tests set out in *Aguilar Quila* namely:

a) the legislative objective of safeguarding vulnerable groups is sufficiently important to justify limiting the Appellant's fundamental right to employment;
b) the measures of barring which have been designed to meet it are rationally connected to it;
c) the inclusion on the barring lists is no more than are necessary to accomplish it;
d) inclusion on both lists strike a fair balance between the rights of the Appellant and the interests of the community.

204. At that time of the barring decision in June 2019 the DBS came to a reasonable conclusion that the Appellant continued to present a risk of harm to children and or vulnerable adults in light of the findings of relevant conduct from 2017. She had not demonstrated a stable and prolonged recovery from the mental illness she was suffering from 2016 to 2018. While discharged from hospital in 2018, she was now suffering from a personality disorder rather than the original postpartum psychosis, together with depression and self harming. She was continuing to receive regular outpatient psychiatric treatment, had been using and addicted to illicit drugs, such as cocaine, and was not allowed unsupervised contact from her own children.

205. We are satisfied that the DBS's assessment of risk was reasonable, and even though we do not defer to the DBS's view, we reach the same assessment while taking into account their expertise. Likewise, the impact on the Appellant's ability to enjoy employment in regulated activity was outweighed by the public interest of protecting vulnerable groups.

206. As indicated above, the evidence that was not available as at June 2019, namely the Appellant's representations of July and October 2019 and all the evidence supplied by the Local authority between October 2020 and May 2021 regarding 2019 strengthens the DBS's view. Their views on risk and proportionality as June 2019 were reasonable.

207. We are satisfied that The Appellant's inclusion in the Lists was not disproportionate as of June 2019 in view of (i) the information held by the Respondent in relation to future risk and (ii) the medical and/or social services information; and (iii) the Appellant's own evidence. We are satisfied that it outweighed the impact of barring upon her ability to obtain employment in regulated activity at that time.

208. There were a number of further matters regarding the Appellant's own evidence that we did not find satisfactory.

209. For example, we do not accept her evidence that she took cocaine by mistake in September 2020 as a result of smoking two puffs on a joint. She has a long history of cocaine addiction resulting in a deviated septum - the account she gave us is unreliable. We note she has previously been unreliable in giving accounts to medical professionals regarding her drug use. Nonetheless we do accept that there is no evidence of any further drug use since September 2020 and that is to the Appellant's credit.

210. We also found her to be understandably overoptimistic in her suggestion that she had made a full and complete recovery from mental illness since January 2019. We do not accept that the Appellant was fully and completely recovered as at June 2019 – the medical, psychological and local authority evidence suggests there were ongoing physical and psychological symptoms at the time and thereafter.

211. We did have other concerns about the Appellant's evidence in terms of her insight into her diagnosis and remorse for her actions for which she could be held more responsible (such as using illicit drugs when not in a psychotic state). We were also concerned by the Appellant's failure to acknowledge that her children's welfare should be a priority over her own child custody wishes and working preferences. Likewise, she did not demonstrate full insight into the fact that barring is for public protection. The potential harm to vulnerable groups should be a priority concern when assessing the risks that the Appellant's behaviour when mentally ill poses.

212. There continued to be an effect of the Appellant's behaviour on her own children in June 2019 in terms of disrupted parenting when not available for them due to drug addiction or poor mental health (later demonstrated in September 2020).

213. There have been 6 months since the family court's decision of 25 January 2021 which appear to have proceeded well. However, as at June 2019 the Appellant had not demonstrated sufficient recovery, insight or stability to be allowed to care for her own children unsupervised – let alone other people's children or vulnerable adults. The DBS made no mistake in finding that at the time she was not resilient to stress and working in the regulated activity may have had induced further mental illness in the Appellant and presented a risk of harm to vulnerable groups.

214. We also accept each of the overarching submissions set out by Mr Webster on behalf of the DBS (see paragraph 194 above) as to why it was not disproportionate to include the Appellant in the list as at June 2019.

215. To the extent that these submissions address the present position we make no findings. As we have consistently emphasised, our task is not to determine the proportionality and risk of harm that the Appellant currently poses at the time of the hearing of the appeal. Those are questions that are the subject of the ongoing review by the DBS under paragraph 18A of Schedule 3 to the Act. The Appellant will have a right of appeal against any decision not to remove her from the list. Nothing we say should be taken as expressing any view on that decision.

216. Likewise, when considering proportionality of the decision to bar the Appellant for 10 years, we do recognise that this is a lengthy period but the Appellant will be entitled to request a further review in light of any future change of circumstances, such as medical developments or full joint custody / unsupervised contact with her children. A decision to maintain a ten-year barring order may well be disproportionate depending on the extent of the Appellant's recovery from mental illness and length of stable behaviour. No doubt the DBS will take into account the length and stability of the recovery in any decision it takes on any review.

217. We do acknowledge that there have been a number of positive features of the Appellant's case recently and we wish to reinforce that this is very much to her credit. It is clear she is requiring much less / little in the way of psychiatric / psychological intervention and supervision beyond the receipt of medication and that she is looking to reduce this even further. She is looking to achieve full joint custody of her children. She is not recorded to have experienced any recent hallucinations or any drug use since the September 2020 incident.

218. The incidents of relevant conduct occurred in 2017, some four years ago and we have found that in relation to the risk of harm to children it was not a likelihood at the time but only a risk. It consisted of expression of a desire which was never acted upon and in the context of the Appellant taking other action to protect the children. They were result of a time limited post-partum psychosis and effects thereafter which must have been very distressing for the Appellant to experience. It is to her credit that she prevented any serious harm to her children at the time. We wish to encourage the Appellant in continuing her steps to recovery which will be for both her and her children's benefit.

219. Therefore, nothing we say is to be taken as a precedent for the DBS when considering other individuals who suffer time limited psychosis or mental illness where there has not been found to be a great risk of harm to vulnerable groups at the time or where there has been a stable recovery since. Each case is very much fact sensitive and there is no doubt DBS should already take this approach to decision making.

220. In conclusion, we are satisfied that the Appellant's inclusion on both lists as at June 2019 was proportionate in the sense that it was no more than was required to accomplish the aim of safeguarding children and vulnerable adults. It struck a fair balance between the Appellant's rights and those of the community. It was the least intrusive measure necessary at the time to safeguard vulnerable groups in light of the Appellant's relevant conduct and the risk that the Appellant posed.

221. We are also satisfied it was not discriminatory for the DBS to take into account the Appellant's mental illness when making its decision. The DBS was required to examined and concentrate upon the Appellant's external behaviour - whether it satisfied the test in law to constitute relevant conduct. The DBS was also required to take into account the effect the Appellant's mental illness presented for her conduct when assessing the risk of harm her future behaviour might pose. This was fundamental to the consideration of the proportionality and appropriateness of including her in the barring lists. The DBS was not making its decision based purely upon the Appellant's mental illness or health - her culpability, or mens rea. The DBS was not required to make a graded assessment of the Appellant's mental states or capacity or fitness concepts imported from other areas of law. It did not bar her from working in regulated activity based upon her mental illness but based on her relevant conduct and risk of future harm her behaviour might present (particularly if there was a reoccurrence).

222. In any event, to the extent it was discriminatory to bar the Appellant based on relevant conduct carried out when she was mentally ill, this difference in treatment was justified for public protection. The DBS was entitled to take this into account.

Conclusion / Disposal

223. The Respondent made no mistake as to law or fact when including the Appellant in both barring lists in June 2019. The Respondent's decision must be confirmed pursuant to s.4(5) of the Act and the appeal dismissed.

224. Nothing we have concluded within this decision should be seen as expressing any view on the outstanding decision that DBS must make as to whether to remove her from the lists pursuant to the review it is conducting under paragraph 18A of Schedule 3 to the Act.

Signed (on the original) Rupert Jones
Judge of the Upper Tribunal **9 August 2021**