JO v Disclosure and Barring Service
[2023] UKUT 308 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-000790-V

ON APPEAL FROM:

Appellant:	**JO**
Respondent:	**Disclosure and Barring Service**
DBS Ref No:	**DBS6191**
Customer ref:	**00941820405**
DBS ID Number:	**P00031YQFPP**

Between:

JO

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Jones**
Tribunal Member Mr B Cairns
Tribunal Member MS J Heggie

Hearing date: 11 May 2023
Decision date: 12 July 2023

Representation:
Appellant: Did not appear and was not represented
Respondent: Mr Ashley Serr, Counsel instructed on behalf of the DBS

DECISION

The decision of the Upper Tribunal is to allow the appeal in part.

The decision of the Disclosure and Barring Service to include the Appellant's name in the Adults' Barred List taken on 29 October 2021 did not involve a mistake on a point of law but it did involve material mistakes in findings of fact. However, some of the findings of relevant conduct did not contain mistakes of

fact and are confirmed. The case is remitted to the DBS to consider afresh whether it is appropriate and proportionate to bar the Appellant in light of the findings of relevant conduct which have been confirmed.

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

This decision and direction are given under section 4(6) 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 29 October 2021 of the Respondent (the Disclosure and Barring Service or 'DBS') to include her name in the Adults' Barred List ("ABL") pursuant to paragraph 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the Act").

2. Permission to appeal was granted by the Upper Tribunal Judge on the papers on 16 June 2022 in respect of all grounds raised by the Appellant in her notice of appeal.

Proceeding in absence

3. We held an oral hearing of the appeal in Field House, London on 11 May 2023. The Appellant did not attend and was not represented. The Respondent DBS was represented by Mr Serr of counsel. We are grateful to him for his submissions.

4. We were satisfied that the hearing should proceed in the Appellant's absence for the purposes of Rule 38. She had been notified of the time, date and location of the hearing in writing and was clearly aware of it.

5. The Appellant had indicated on 9 May 2023 (within the 14 day time period set in the Tribunal's Unless Order / directions of April 2023) that she did not intend to attend the hearing because she would be at work. She did not apply for an adjournment or postponement of the hearing or for the case to be heard on another occasion.

6. On 10 May 2023, the day before the hearing, the Tribunal issued directions in these terms:

    1. The hearing of the Appellant's appeal is to proceed tomorrow (on 11 May 2023 at 10.30am) as currently listed.

    2. The Appellant is urged by the Tribunal to attend the hearing even though she has indicated she intends to be at work.

3. She should not worry about attending the hearing alone or that she will be unrepresented (not have a lawyer or other representative at the hearing with her). The Tribunal is used to hearing from unrepresented Appellants and assisting them in putting their case. If the Appellant attends it will enable her to explain her grounds of appeal more fully to the Tribunal (The Tribunal will be able to give her help as appropriate – for example the panel can ask questions of the DBS that she would like to be asked and help the Appellant give her evidence or, if she prefers, simply hear her arguments). If she attends the hearing tomorrow, it will assist the Tribunal in understanding the Appellant's case as fully as possible and determine her appeal in a manner that is just and fair.

4. The Appellant should understand that if she does not attend the hearing tomorrow, then the Tribunal may proceed to hear the case in her absence if it is satisfied it is in the interests of justice to do so. If it proceeds without the Appellant tomorrow, the Tribunal may still ask questions of the DBS, test their evidence and reasoning, and consider everything that the Appellant has written. However, it will not have the benefit of having heard from her in-person. In all circumstances, the Tribunal will have to weigh up all the evidence, both oral and written, that it hears and make relevant findings on the grounds of appeal.

Further Direction

5. If the Appellant would prefer to attend or participate in the hearing by internet video software (CVP) or by telephone she should email the Tribunal by 3.30pm today (10 May 2023) and it will inform the parties by 4.30pm of the form the hearing is to take.

7. The Appellant did not respond to these directions. Further, the clerk to the Tribunal telephoned the Appellant on the morning of the hearing but was not able to contact her.

8. The Tribunal was satisfied it was just and fair to proceed with the hearing in the Appellant's absence – in accordance with the overriding objective and in the interests of justice. It was clear that the Applicant did not seek an adjournment of the hearing so that there was no purpose in holding any further hearing as it would not secure her attendance. The Tribunal had before it all the relevant submissions, correspondence and representations made by the Appellant to the DBS and to the Tribunal in respect of the appeal and took these into account on her behalf when deciding the appeal.

Rule 14 order - Anonymity

9. At the outset of the hearing we made an order that there was to be no publication of any matter likely to lead members of the public directly or indirectly to identify the Appellant or any person who had been involved in the circumstances giving rise to this appeal (witnesses or complainants) pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008. We were satisfied that the Appellant, should not be identified, directly by name or indirectly, in this decision but referred to as 'JO' (or 'the Appellant).

10. 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 the Appellant or any person who had been involved in the circumstances giving rise to this appeal. Any documents sought to be disclosed would need to be redacted for identifying information.

11. We made a further order under rule 14(1)(b) and (2) prohibiting the publication or disclosure of any information or document which may lead members of the public

to identify any of the individuals (witnesses and complainants) listed in the Respondent's letter application and the Applicant herself. Identifying the Applicant herself may also lead to the identification of any complainants or witnesses. The individuals listed in the Respondent's application are to be referred to in the manner set out therein.

12. Identifying the Appellant herself may also lead to the identification of any complainants or witnesses. Further, the Appellant is the subject of sensitive misconduct allegations which took place in residential care home. We are satisfied that identifying her at this stage may lead to serious and disproportionate harm to her reputation and employment prospects (an interference with the right to private life under article 8 of the ECHR) when the barring decision of the Respondent is not published generally to the world.

13. There is an expectation and legal prohibition that the name and identity of the Appellant as appearing on a barred list (and whomever is included on the barred lists) is not publicised to the world or generally (it is known by the Appellant, the DBS, and any other party who may seek to conduct a DBS check upon him eg. a prospective or current employer). We also rely on the further reasons explained in *R (SXM) v Disclosure and Barring Service* [2020] EWHC 624 (Admin), [2020] 1 WLR 3259. In that case the victim wanted to know the outcome of the referral to DBS. The Administrative Court held: (a) disclosure was not consistent with the statutory structure; (b) refusing to disclose was neither unreasonable nor disproportionate; and (c) there was no positive obligation to disclose under the Article 8 Convention right. The public interest in the protection and safeguarding of vulnerable groups is sufficiently protected by the barring decision itself and identification of the Appellant's name only to prospective employers or those otherwise entitled to obtain information regarding her from the DBS.

14. Identifying the Appellant may lead to the identification of all the parties / individuals / witnesses who are to be anonymised / not identified by virtue of the other orders being made and who may otherwise be identified or linked to the Appellant by virtue of the evidence of the case. Having regard to the interests of justice, we were satisfied that it was proportionate to give such directions. This is for the reason that revealing the identity of any of the witnesses or complainants to the public would be likely to cause the complainants and the witnesses (residents or carers in a care home) emotional or psychological harm as they themselves were vulnerable, the potential victims of harmful conduct, or they had an expectation of privacy. The Appellant has not been prejudiced by anonymising the witnesses – she has been aware of their identities throughout and has been able to identify them to answer their evidence and allegations.

15. We therefore make an order prohibiting the disclosure of any information that would be likely to identify the Appellant, complainants or witnesses.

The Barring Decision subject to appeal

16. On 29 October 2021 the DBS made a decision to include the Appellant on the ABL which it communicated in its Final Decision Letter.

17. The letter stated the DBS was satisfied of the following two findings of relevant conduct against JO (which were made on the balance or probabilities):

> Allegation 3
> That you instructed carers not to give food or water to two residents who were receiving end of life care.
>
> Allegation 1
> That on various occasions in your employment you prevented residents from making choices about food or where they sat, made residents feel uncomfortable in their own home, talked to residents in an inappropriate manner by telling them to shut up.

18. The letter gave reasons for the findings:

> The DBS is satisfied you have engaged in conduct which harmed or could harm children and vulnerable adults. Your solicitor appeared to be dismissing your behaviour as one off instances brought about by stressful situations. However this would not appear to be the case - you deliberately deprived one resident of sandwiches on more than one occasion, and refused to serve another resident semi-skimmed milk on more than one occasion. You also questioned the reliability of the witnesses interviewed, and said that two people said that they had no problem with you . This is not the case, one person said she had only worked for three weeks which was not enough time for her to formulate an opinion on you.
>
> However that staff member also said that residents and staff had complained to her about your attitude and practice. The Care Leader who did describe you as a valuable member of staff had also been approached by residents and staff about you and said that she thought staff were reluctant to complain as nothing ever got done. There is no evidence that the staff colluded with each other - they were not interviewed on the same day and bringing up the same incidents that caused concern to them does not indicate collusion. It is noted that they both made the allegations on the same day which you believed was to make a bigger impact. However even if the two staff members had talked to each other it does not mean that the allegations are automatically false. You believed that the staff resented the fact that during COVID19 pandemic, you had assumed leadership responsibilities by default as you were the longest serving and most experienced member of staff. You stated that you were the victim of malicious allegations which had come about because the staff who complained did not like you.
>
> You denied that you had instructed a carer to withhold food and fluids from an end of life resident, stating that to do so would be a criminal offence. You were an experienced carer and would be aware of the consequences of doing such a thing. However the carer who reported being told by you that she had been instructed to withhold food and fluids from a resident approaching end of life was also an experienced carer and would also be aware of the seriousness of making an allegation of this nature. There are some concerns as to why this was not reported immediately but it would appear that the activities co-ordinator was prepared to resign and whistleblow to CQC once she found about it. It would also appear that

matters had been raised in the past but nothing was ever done about any concerns and therefore carers stopped reporting them.

As you resigned prior to a disciplinary meeting this allegation was not fully explored. The investigation concluded that there were grounds for a disciplinary meeting but due to your resignation this did not take place. Although it is acknowledged that the initial allegations did not mention this specific allegation, it was referred to as part of the investigation findings with the recommendation that a disciplinary hearing should take place. It would appear more likely than not that it would have been covered within any subsequent hearing.

Due to the seriousness of this allegation and the experience of the carer who raised it, it is unlikely that this is a false allegation. You provided no evidence other than the allegation was malicious. However both the carer and the activities co-ordinator have provided other evidence, which has been supported by residents and some other staff, of your attitude toward residents. These are deemed to be credible. There is no reason why this carer's credibility should be diminished in the light of this allegation.

It is acknowledged that your actions would appear to be out of character based on the testimonials received. Your current line manager was particularly complimentary about you. However your current work appears to be in domiciliary rather than residential care which would limit your contact with service users and other staff and is a completely different role to residential care. In addition, it is unclear how your character references knew of the allegations made against you and that at least one of them concluded that it was malicious and that residents had been encouraged to complain by those carers. It would appear likely that this information was given to them by you and is not based on their knowledge of events. There is nothing to suggest that residents had been encouraged to complain. The residents interviewed had capacity and it would be reasonable to assume that if they were satisfied with your conduct they would have said so.

DBS are satisfied that you caused harm to the residents that you cared for. You have shown a lack of empathy and a callousness towards the residents in your care, you appeared to demonstrate a dictatorial attitude towards the residents and acted in an uncaring manner. It would appear to have continued for some time with both staff and residents reporting similar behaviours. You appeared to deprive residents of things they would like or had requested without any valid reason. The requests would have been easy to fulfil - such as a resident wanting semi-skimmed milk. You were seen to deliberately give her full fat milk. Some residents said that they dreaded when you were on duty. You denied most of the allegations against you therefore you have not shown any insight into your behaviour. You have caused emotional harm to residents over a period of time. DBS therefore believe that the risk of repetition is high and including you on the Adults' Barred List is an appropriate decision due to the further risk of emotional harm by not providing the required care as well as the nature and seriousness of your behaviour.

19. The letter addressed the proportionality of the barring decision in the following manner:

It is acknowledged that a barring decision would significantly impact on your ability to find work. It is known that you have spent 35 years working within the care sector and 16 years at [the residential home] prior to your resignation. It may also impact

> on any volunteering activities or hobbies you may have. However due to the unacceptable risk of future harm including you on the Adults Barred List is also a proportionate response. Your rights under Article 8 of the European Convention on Human Rights have been considered. DBS's final decision is that you be excluded from working with vulnerable adults by you inclusion on the Adults' Barred List.

Appellant's Grounds of Appeal

20. In her Grounds of Appeal (his "Reasons for Appealing" document) enclosed with her notice of appeal dated 1 December 2021, the Appellant provided grounds of appeal drafted by her solicitors (who no longer represent her).

21. There were three grounds alleging mistake of fact and three grounds alleging mistake of law in the barring decision:

> Error in findings of fact
>
> I contend that
>
> a) On the face of the evidence that the DBS considered there was no evidence capable of establishing that I denied food or water to "end of life" residents (1 above);
>
> b) that there was an insufficient evidential basis for finding that I had behaved in a disrespectful
> manner towards residents (2 above); and
>
> c) the DBS's analysis of the evidence reflects a failure on its part to understand and to appreciate the true import of the evidence it considered.
>
> Errors in law
>
> In addition, I contend that the DBS's analysis of the evidence submitted to it, both by my former employer and by me through my solicitor, reflects a failure on its part to:
>
> a) Consider whether the evidence submitted proved the misconduct alleged against me; instead, the DBS appears have considered whether the evidence I submitted (and the submissions made by my solicitor on my behalf) proved that the evidence of witnesses, submitted by my former employer, was false - the DBS in effect imposed on me the burden of proving that the allegations were false;
>
> b) Treat the evidence of my exemplary record as a carer as evidence which tended to prove that I did not commit the misconduct alleged; instead it appears to have treated that evidence as being capable only of mitigating it peremptory finding of misconduct
>
> c) Have regard to the principle that any finding of very serious, and thus unusual and inherently unlikely misconduct, requires evidence of a commensurately cogent nature.

22. The Appellant also made general representations as to the mistake of fact in both findings made by the DBS as follows:

> c) The DBS's analysis of the evidence reflects a failure on its part to understand and to appreciate the true import of the evidence it considered.

Firstly, the DBS's evidence, the DBS wholly and illogically discounts the evidence of two staff members, who said that they had not witnessed conduct of the sort alleged by the other two staff members (one of whom had spoken about me in glowing terms) because each had heard of negative reports made about me.

The DBS letter includes the following:

"You said that two people said that they had no problem with you. This is not the case, one person said that she had only work for three weeks which was not enough time for her to formulate an opinion on you. However, that staff member also said that residents and staff complained to her about your attitude and practice. The care leader who did describe you as a valuable member of staff had all so been approached by residents and staff about you and said that she thought staff were reluctant to complain as nothing ever got done"

Secondly, the DBS discounts the weight of the evidence of my current manager who confirms my excellent performance in my role as a carer, on the erroneous basis that my role did not include caring responsibilities. The DBS letter says:

"Your current line manager was particularly complimentary about you. However your current work appears to be in the domiciliary rather than residential care which would limit your contact with service users and other staff and is a completely different role to residential care"

In fact, my manager makes very clear in her letter that my job involved caring responsibilities. I also produced testimonials from the families of residents I had cared for in my current role.

Thirdly, the DBS discounts the weight of the evidence of witnesses who supported my contention that some allegations were false, and apparently malicious, on the basis that the witnesses had no personal knowledge of facts tending to show that the allegations were false and malicious.

The DBS letter include the following:

"In addition, it is unclear how your character references knew of the allegations made against you and that at least one of them concluded that it was malicious and that residents have been encouraged to complain by those carers. It would appear likely that this information was given to them by you and it's not based on their knowledge of events. "

Four witnesses (described as character witnesses) whose statements I produced to DBS, confirm in their statements that they were colleagues who worked alongside me, some for many years, and some at the time of the alleged misconduct. One of the witnesses confirmed that one of the two residents who complained about me had subsequently made a verifiably false allegation against another member of staff.

Fourthly, the DBS found, as a fact, "Some residents said that they dreaded when you were on duty':

Neither of the two residents who provided statements said any such thing. One of the two said that she was "wary" of me.

Fifthly, The DBS wholly failed to deal with my Solicitor's submission that one of the two staff members had admitted that she was a "back biter" and that this admission lent support to my case that the allegations made against me had been maliciously concocted.

My Solicitor's submission was in the following terms:

The Activity Co-ordinator, refers to a culture at [the home], which she characterises in the following terms,

"I've heard a lot of moaning, we are all good at that... there is a lot of backbiting and negativity... I am outspoken so they have decided I will be the next to be pushed out the door. "We are all good at that", apparently including herself as a person who moans, back-bites and is negative. The dictionary definition of "back-bites" is "talk maliciously about someone who is not present." Mrs O's case is that the complaint about her amounts to such back-biting.

23. The Appellant's solicitor made submissions as to errors of law in the following terms:

Errors in Law

a) The DBS did not consider whether the evidence against me proved the misconduct alleged against me but appears instead to have considered whether the evidence I submitted (and the submissions made by my solicitor on my behalf) proved that the evidence of witnesses against me was false- the DBS's starting point was that I was guilty unless I could prove that the allegations were false

My solicitor contended that the fact that the two staff members had made reports against me on the same day was unlikely to have been a mere coincidence and that they had probably discussed the reports each would make against me and had probably co-ordinated the timing of their reports to maximise their impact.

The DBS dealt with this contention in the following terms:

'There is no evidence that the staff colluded with each other - they were not interviewed on the same day and bringing up the same incidents that cause concern to them does not indicate collusion. It is noted that they both made the allegations on the same day, which you believe was to make a bigger impact. However even if the two staff members had talk to each other it does not mean that the allegations are automatically false. You believe that the staff presented the fact that during CO VID-19 pandemic, you had assumed leadership responsibilities by default as you were the longest serving and most experienced member of staff. You stated that you were the victim of malicious allegations which should come about because the staff who complained did not like you.'

The conclusion the DBS draws about the fact that the two staff members made their reports on the same day is that that fact does not prove that their allegations were false rather than concluding that the fact tended to undermine the truth of their reports. The DBS's approach reflects its reversal of the burden of proof.

b) The DBS did not treat the evidence of my exemplary record as a carer as evidence which tended to prove that I did not commit the misconduct alleged; instead it appears to have treated that evidence as being capable only of mitigating it's peremptory finding of misconduct.

I produced evidence of

• several character witnesses, some of whom were my colleagues for many years, and all of whom spoke about my commitment to the people for whom I cared;
• a prestigious award I received from my former employer, the Order of St John's Bronze Medal of Merit, for my work as a carer; and
• my 35 year career as a carer, during which it had never been alleged that I had behaved poorly
towards residents.

The DBS dealt with this evidence in the following terms:

"It is acknowledged that your actions would appear to be out of character based on the testimony was received."

The DBS did not treat the evidence of my exemplary record as evidence, which tended to show that the
allegations made against me were untrue.

(c) The DBS failed to have regard to the principle that any finding of very serious, and thus unusual and inherently unlikely, misconduct, requires evidence of a commensurately cogent nature.

My solicitor said, apropos of the very serious allegation that I had instructed the withholding of food and fluids, that the DBS should have regard to the above-mentioned long-established principle, the classic statement of which is:

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. (Lord Nicholls in re H (Minors) [1996] AC 563 at 586)"

Rather than acknowledge that the incomplete and unverified nature of the evidence (that I had
improperly instructed the withholding of food and fluids) necessarily made it harder, if not impossible, for it to find that I had given such improper instructions, the DBS concluded:

"You denied that you had instructed a carer to with hold food and fluids from an end-of-life resident, stating that to do so would be a criminal offence. You are an experience carer and would have been aware of the consequences of doing such a thing. However, the carer who reported being told by you that she had been instructed to withhold food and fluids from a resident approaching end of life was also an experienced carer and would also be aware of the seriousness of making an allegation of this nature. There are some concerns as to why this was not reported immediately

but it would appear that the activities coordinator was prepared to resign and whistle blow to CQC when she found out about it.

It would also appear that matters have been raised in the past but nothing was ever done about any concerns and therefore carers stopped reporting them.

As you resigned prior to a disciplinary meeting this allegation was not fully explored. The investigation concluded that there were grounds for disciplinary meeting but due to your resignation, this did not take place. Although it is acknowledged that the initial allegations did not mention this specific allegation, it was referred as part of the investigation findings with the recommendation that a disciplinary hearing should take place. It would appear more likely than not that it would have been covered within any subsequent hearing."

The DBS concedes that my former employer did not find that I had given the alleged improper instruction, and that the evidence on this issue was unsatisfactory and incomplete, but nonetheless concludes that I had given the instruction.

The evidence in the appeal

24. The DBS relied on written evidence from six witnesses contained in their bundle of evidence. This was the evidence relied upon in making the barring decision and in defending the appeal. The relevant evidence is referred to in the DBS submission below and we make findings of fact based upon it in the discussion section.

25. The Appellant provided a detailed 14-page witness statement dated 30 September 2021 (p. 89-101) signed with a statement of truth. She also relied on all the testimonials and character evidence she had supplied to DBS which were contained in the hearing bundle. Again, we make findings of fact in relation to this evidence in the discussion section below.

Law

26. The relevant statutory provisions and authorities are set out in the Appendix to this decision. The most relevant part to reproduce within the body of the decision is our approach to considering mistakes of fact.

27. The extent of the jurisdiction for the Upper Tribunal to determine mistakes of fact by the DBS and make its own findings of fact was outlined 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.'

The DBS submissions

28. Mr Serr made the following submissions on behalf of the DBS opposing the appeal.

29. He acknowledged that the Appellant worked in regulated activity as a care leader at the relevant residential care home which was the employer.

30. He relied on the fact that initial concerns were raised by staff and residents (p.69 of the bundle) which led to an investigation and JO being suspended on 2/10/20 (p.70), interviewed on 7/10/20 and resigning on 9/10/20. She was invited to make representations about a DBS referral on 26/10/20 but seemingly declined to do so (p.81). She did not bring a claim to the employment tribunal for unfair dismissal. Accordingly, there is no finding by the employer (other than a case to answer) and no findings by a Tribunal.

31. He argued that in the circumstances an analysis of the evidence the employer had is essential and referred to the pages of evidence within the hearing bundle and the relevant statements from a total of six individuals: the four complainant colleagues and two residents, who were relied on as witnesses by the DBS in making its findings of relevant conduct.

Activity Co-Ordinator (said to be BG)
(i) Said to be so concerned she was going to resign and report the matter to the CQC (Care Quality Commission) - p. 45.
(ii) Carer reported that JO had been on "the shout"- p.45.
(iii) Resident reported JO had gone into his room and shouted at him for wrongly completing a form. Believed JO would remove him from the home. Made him feel small and stupid. Was extremely upset - p.45/46.

(iv) JO suggested residents feigned illness - p.46.
(v) JO shouted at a dementia patient to return to her room which distressed her - p.46/47.
(vi) JO told a resident not to take a call from a relative in Canada which upset her - p.47.
(vii) She inferred that JO gave an instruction not to give food and drink to end of life patients-p.48.
(viii) She was told by a resident that JO controlled who could and couldn't see a GP and would not retain medical confidentiality about problems-p.48.
(ix) JO is behind some of the bullying and some residents dread when she is on duty - p.
49-50.

Head of Care Covering Maternity (said to be K…)
(i) Reported concerns from residents that following questioning JO she was victimised-p.51.
(ii) Resident did not want to remain at the home due to JO-p.52.
(iii) Complaints from 2 co-workers on 1/10/20. Reported resident T was 'stealing' food which he was in fact entitled to have due to JO wrongly refusing him it-p.52.
(iv) Co-worker also reported that JO had told a resident to shut up or go to their room so JO could watch TV-p.52.

Care leader (said to be LT)
(i) Co-workers complained about the way JO speaks to residents. Rude and spiteful. JO refuses to allow particular residents to have a sandwich or semi skimmed milk without good reason -p.54-55.
(ii) Residents complained JO is rude, won't allow semi skimmed milk, to shut up or go to their room as she is watching TV. Makes resident frightened-p.55.

Carer (said to be JT)
(i) Told by JO not to give food or water to end of life patient and refused to allow food and water for another end of life resident-p.57.
(ii) JO loses temper with residents and told residents they will lose their home and have to leave-p.58.
(iii) JO is disliked by staff and residents-p.58.
(iv) JO refused to let a resident have semi skimmed milk and surreptitiously substituted full fat milk and fed it to that resident-p.58-59/60.
(v) JO refuses to let a resident have sandwiches causing him to secrete them-p.59.
(vi) JO refusing food and drink for end of life residents-p.59.
(vii) JO telling residents to shut up or go to their rooms-p.59.
(viii) JO taking away residents' choices, dictating bed time, turning off music-p.60.

Resident (said to be E…)
(i) Been told to be quiet while JO watches TV-p.61.
(ii) JO told her to shut up and not take phone call from son during tea time -p.61.
(iii) JO told another resident to shut up-p.61.
(iv) JO makes her feel cautious.

Resident

(i) Feels JO is in charge of whole building, intimidating and scary - p.65.
(ii) JO was aggressive when reported - p.65.
(iii) JO rude to her and raises her voice- p.65.
(iv) JO is rough when delivering care and on occasion had left residents not properly washed-p.65.
(v) JO told the resident on occasion to shut up or go to her room. She has made her want to leave the home-p.65.
(vi) JO will watch TV while working-p.65.
(vii) Thinks JO should not be working at the home - p66.

32. Mr Serr submitted that JO did attend an interview on 7/10/20 and her answers were unilluminating:

    (i) The allegation about denying resident semi skimmed milk was denied as being fabricated "to cause trouble"-p.75/76.
    (ii) The allegation about making a resident cut a call short was denied although the fact of the call was not-p.76.
    (iii) The allegation about resident T hiding sandwiches was just denied-p.77.
    (iv) The allegation about telling the residents to shut up was denied as being fabricated "to cause trouble"- p.78
    (v) The allegation about refusing food/water for end of life patients was denied unless it was in the GP notes - p.79

33. Mr Serr contended that an analysis of the evidence shows that both residents and co-workers independently raised matters of similar concern about JO leading to an investigation in October 2020. The evidence produced from that investigation demonstrates that JO had a controlling bullying manner. JO could be shouting and aggressive to vulnerable residents, wrongly refused certain resident's foods which they preferred, threatened residents causing them to fear the loss of their accommodation and refused nutrition to end of life patients.

34. He relied on the fact that the employer and residential home concluded there was a case to answer for a disciplinary hearing (p.72-73). He submitted that the DBS noted how similar allegations appear from different witnesses (both residents and staff) corroborating each other. JO attended an investigation meeting providing no real cogent explanations.

35. He relied on the fact the Appellant resigned prior to attending a disciplinary hearing, failed to attend a meeting post resignation to make representations following notification that she was to be referred to the DBS (p.81) and did not bring a claim to the Employment Tribunal.

36. He argued that there is no reason why different complainants would collectively fabricate the same allegations against JO for no apparent reason. The DBS took full account of the representations by JO but was satisfied that the conduct was proven.

37. He submitted that there was no mistake of fact or law in the barring decision and the appeal should be dismissed.

Discussion and Decision

38. We have examined all the evidence in the case, both that which was before the DBS and that submitted by the Appellant as part of her appeal and make findings of fact as set out below.

39. In light of these, we will consider whether the DBS made mistakes of fact in accordance with the approach set out in *PF v DBS*. The burden of proof remained on the DBS when making its findings of relevant conduct in its barring decision. Thereafter on the appeal the burden was on the Appellant to establish a mistake of fact:

    '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.'

40. Furthermore, '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…. 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...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.'

41. We note that the Appellant did not attend the hearing of the appeal and was not cross examined but neither were the DBS's witnesses so there is no difference in the weight to be given to their written evidence. We draw no adverse inference from the Appellant's absence from the hearing because we accept her explanation for not attending. Likewise, we draw no adverse inference from her failure to attend a disciplinary hearing before her employer or bring Employment Tribunal proceedings. In circumstances where she found alternative employment, did not know at the time that a referral was being made to the DBS and where employment tribunals claims can be stressful and time consuming, these are not necessarily the actions of a person who accepts the allegations made by her employer. Rather they might reasonably wish to 'move on' with their life. Each case requires a fact specific consideration.

42. It is also worth noting that at the time in question the care home was operating in the midst of the COVID pandemic with all the pressure and stresses that this brought.

Mistake of fact grounds of appeal considered

Allegation 3

43. This is a very serious allegation which the DBS found to be proved as relevant conduct: that JO instructed carers not to give food or water to two residents who were receiving end of life care.

44. We largely agree with the Appellant's grounds of appeal submitting there was a mistake of fact in relation to this allegation and finding. She made representations as to their being a mistake of fact in the DBS's finding on Allegation 3 as follows:

> Errors in Findings of Fact
>
> (a) On the face of the evidence that the DBS considered there was no evidence capable of establishing that I denied food or water to "end of life" residents
>
> The evidence to support this very serious allegation derives from the statements of two members of staff.
>
> One of the two members of staff said the following and no more
>
> 'I was worried about an incident with a resident upstairs who was end-of-life, I was told by JO not to give her food or water because she was end of life. There was no manager available, so I gave her water and jelly. This resident died in distress, no one else had said no food or water just JO and it was not said in handover. There was another resident whose daughter kept coming in to give jelly and water and J was cross with the daughter as the resident was end-of-life'
>
> The other member of staff was "an activity co-ordinator" as opposed to a member of staff whose role included care tasks. The member of staff was not involved in providing care to the two end-of-life residents to whom her allegations related.
>
> I reproduce (verbatim) her evidence, as it relates to the allegation of withholding food and water….:
>
> "A. I heard from a couple of care staff, I can't remember who it was, that she shouldn't be given food and drink, but they were giving her food and drink, not to encourage it, I can't remember the logic behind it, it was horrible,
>
> Q. Do you know who had given that instruction?
>
> A. I wish I did I know that some people did give food and drink, it wouldn't of come from carer to carer and the person that was always on duty during Covid was JO. We had no other real manager in other than BLANK there was nobody really around and BLANK couldn't leave the office as she has a heart condition and so a lot of reassurance and backup came from the admin. I don't specifically know where it came from
>
> Q. Was it a similar scenario for the other resident receiving end of life care?
>
> A. The other lady was on and off end of life, bless her, the manager at the time .... was investigated because of pain, when she saw her family she improved immensely, but then she was put on a driver, she wasn't very well. I'm sure her family came in. I did hear a passing comment from JO who said "God I wish they would stop feeding her and giving her fluid''.

Another time I have heard carers say well I have been told not to give her food and fluid, but I have. That lovely lady passed. I think it was a weekend, I know the day before she had a carer sat with her, she had her nails painted and I know she passed well (crying apologised for getting upset.)”

The evidence submitted by my former employer did not include any evidence which:

• identified the residents allegedly denied food and water on my instructions;
• identified when the instruction was allegedly given;
• dealt with the medical condition of the residents and the particulars of any medical advice which had been given about what food or fluids the two residents should or should not be given;
• in the case of care co-ordinator, identified the carers whom, the member of staff claims, I improperly instructed not to feed or provide fluids to two residents or identifies (even second- hand) that the person who gave the instruction was me;

Following its investigation, my former employer was not satisfied that I had improperly instructed carers to withhold food and fluids.

Its decision to dismiss me, and its referral of my case to DBS, was not based on a finding that I had improperly instructed careers to withhold food and fluids.

The DBS dealt with the apparent anomaly- that it was satisfied that I had given an improper instruction though my former employer was not- in the following terms:

‘Although it is acknowledged that the initial allegations did not mention this specific allegation, it was referred as part of the investigation findings with the recommendation that a disciplinary hearing should take place. It would appear more likely than not that it would have been covered within any subsequent hearing.’

The implication of the above words is that had my former employer given greater consideration to this allegation, it would necessarily have been satisfied that I had given the improper instruction.

45. Further, the Appellant addressed this allegation at length in her witness statement dated 30 September 2021. It was a detailed statement (far more detailed than the interview notes of the witnesses relied on by the DBS). She addressed each piece of evidence from each witness. She does not simply deny this allegation but gave a positive alternative explanation.

46. For example, at paragraphs 70-72 of the Appellant’s statement she states:

‘70. End of life residents are cared for in accordance with medical advice which is recorded in the residents’ MCT notes. I have never instructed a carer to feed or not feed in contradiction of medical advice. To do so would be criminal.

71.I will advise carers who feed End of Life residents, to do so with care, and be aware of any difficulty the resident has in swallowing, as I have known residents, who struggle to swallow, choke by inhaling the food they are given.

72.We would have a regular, daily, "10 O' Clock" carers' meeting when such cases were discussed. BG would not have attended such meetings, as she is not a carer. She would not therefore have been familiar with the medical advice for the End of Life cases.'

47. Later on, the Appellant states:

83. She [the witness] mentions a denial of food and water to an End of Life resident
She says:
JO told her not to give food or water to an end of life resident.
She gave her water and jelly.
The resident died in distress.
"No one else had said no food or water just JO and it wasn't said in handover"

84. I have never instructed a carer to feed or not to feed an End of Life resident contrary to medical advice
85. She mentions another such case
She says there was another resident whose daughter kept coming in to give jelly and water and JO was cross with the daughter as the resident was end of life.

86. I have never been cross with anyone, carer or resident's family member, for feeding a resident in accordance with medical advice. If a resident struggled to swallow food, I would suggest jelly.

48. We accept the Appellant's comments on the reliability of BG's evidence as set out at para 72 of her statement. Further and importantly, the evidence of BG on this topic is weak – it is hearsay and unspecified - it is not capable of identifying the Appellant positively as the alleged perpetrator because the witness did not know where the instruction regarding end of life care came from. The notes of BG's interview records:

'I heard from a couple of care staff, I cant remember who it was, but that she shouldn't be given food and drink, but they were giving her food and drink, not to encourage it, I can't remember the logic behind it, it was horrible,

Do you know who had given that instruction?

I wish I did I know that some did give food and drink, it wouldn't have come from carer to carer and the person that was always on duty during COVID was JO. We had no other real manager in other than…. There was nobody really around and X…couldn't leave the office as he has a heart condition and so a lot of the reassurance and back up came from the Admin.

I don't specifically know where it came from…'

49. Therefore, very little weight can be placed on this evidence.

50. JT was the only positive witness against the Appellant and it was her word against the Appellant's. The note of JT's interview is recorded as stating:

'I am worried about an incident with a resident upstairs who was end of life, I was told by JO not to give her food or water because she was end of life. There was no manager available, so I gave her water and Jelly. This resident died in distress, no one else had

said no food or water just JO and it wasn't said in handover. There was another resident whose daughter kept coming in to give jelly and water and JO was cross with the daughter as the resident was end of life. This resident was called….'

51. JT's evidence comes from notes of an interview and not from a signed witness statement like the Appellant had provided. There was no clear medical evidence as to what this resident was supposed to receive by way of nutrition to support JT's account on this matter. While we accept parts of JT's other evidence, we are satisfied that this evidence comes from a mistaken perception and she has misinterpreted what JO has said for the reasons the Appellant has explained.

52. In her handwritten letter dated 7 November 2021 (page 130) the Appellant states: 'All I said about an end of life resident is that if they start choking you will have to stop as they might not be swallowing the food or drink and the fluid could go into their lungs and we would have to ring the GP for advice'.

53. We accept the Appellant's explanation in this letter as to how instructions might be given concerning patients potentially choking. They support the context of how what she said could be misinterpreted or miscommunicated

54. We have considered JO's written evidence on this allegation and find it to be reliable even though it was not tested in cross examination. We note that the allegation and finding of the DBS was based on the hearsay evidence of the two former colleagues, Activity Coordinator BG and carer LT. We accept, on the balance of probabilities, the positive explanation in the Appellant's witness statement about the need for careful treatment of residents for whom swallowing may be difficulty.

55. We also take into account that in her interview with her employer, the allegation was not put to the Appellant specifically – so she never previously had opportunity to answer specific allegations before her witness statement was served a year later in 2021 – when she completely denied the allegation relating to end of life treatment.

56. Furthermore, the Appellant's employer did not pursue this allegation against her – and it was the most serious allegation that could not reasonably be ignored. It was not a ground pursued in the suspension of employment letter or on the employer's referral to the DBS.

57. Instead, we are satisfied on the balance of probabilities, taking into account all the evidence before us, that the DBS made a mistake of fact in making this finding. We are satisfied that the DBS made a mistake of fact in finding this allegation proved on balance of probabilities. We are satisfied that it was a mistake of fact on which the DBS barring decision was based.

Allegation 1

58. Allegation 1 upon which the DBS made a finding of relevant conduct against the Appellant was that on various occasions in her employment she prevented residents from making choices about food or where they sat, made residents feel

uncomfortable in their own home, talked to residents in an inappropriate manner by telling them to shut up.

59. We break this down into the various sub allegations contained therein.

60. We bear in mind that the allegation as a whole is supported by six witnesses, four colleagues and two residents - albeit not all speak to each of the sub allegations.

61. First is the allegation that on various occasions the Appellant prevented residents from making choices about food. There was evidence from 1 or 2 carers that JO did not like to keep sandwiches for one resident (a woman hiding food in drawers) but threw them away. There was also a hearsay from one resident (p.61) – it seems to be a hearsay report - and from another resident (p.57) who was reporting directly of the same.

62. However, there is no evidence as to the care home policy on food in rooms – it is unclear what the rules were. Further, there are mainly only hearsay reports against the Appellant.

63. The Appellant states in her statement (paras. 66-68) that she did throw away sandwiches but she was not preventing residents from having them or food outside mealtimes. For example, if elderly residents were keeping sandwiches for later and they would go off (become stale or unhygienic) she would remove them so that fresh sandwiches could be made on request. If she found residents hording food, she would throw it away:

> 64.The resident was E… who has made a statement, which I shall deal with later in this statement.
>
> 65. She reports that I denied a male resident food when he wanted to eat it. She says:
> She saw a male resident at the food trolley at teatime who was "ramming in bits of the sandwiches that were left over on the trolley".
> She had heard from one or two carers that I didn't like to keep: sandwiches for the residents.
> That I have said that they should not be kept in the fridge. "as far as I'm aware... they wait for him to ask and if he doesn't then they go in the bin"
>
> 66. I recall a gentleman who would like to eat at odd times, for whom I would get snacks between meal times. That may be the gentleman to whom she is referring. I recall saying to this gentleman that if he did not want to eat his sandwiches straight away I would give him fresh ones later, as the ones he had would go dry if he kept them and delayed eating them. I am not aware that the man would hide his sandwiches. He would eat them. I have given crisps and biscuits to this resident outside meal times.
>
> 67. I never objected to residents having food outside mealtimes. I would get residents toast, beans on toast, poached eggs, sandwiches, biscuits or cereal at such times.
>
> 68. I have thrown away food kept by one of the residents, a lady called P, but not from the gentleman I mention. P would keep sandwiches in a draw in. her room to give to her husband when he came to visit. She would forget them and, once discovered by staff they would be thrown out, as they were stale and unhygienic.

64. The Appellant addressed the mistake of fact in this sub-finding within Allegation 1 in her grounds of appeal as follows:

> There is no first-hand evidence that I prevented a resident from eating food outside meal times. The evidence, which supports this allegation, is that a resident had hidden food because, it was supposed, I would have disapproved.
>
> The DBS finding that I had put full fat milk into a resident's cup of tea (when the resident preferred semi-skimmed milk) fails to deal with my explanation that I did so, not from spite, but because there was only full fat milk available.
>
> The evidence of the two residents, about my treatment of them is not couched in the same categorical terms as the second-hand evidence of the two care staff.

65. We find there was a mistake of fact in DBS finding this sub-allegation proved on the balance of probabilities as relevant conduct – causing or likely to cause harm. It is not enough to prove that the Appellant was throwing away food but that she was deliberately or recklessly causing harm to patients by restricting or throwing away their food. We find there was a mistake of fact in relation to this sub-allegation based on all the evidence in the case once considered.

66. In respect of restricting access to milk, this is also not proven to be relevant conduct – we accept the Appellant's explanation in her submissions: 'The DBS finding that I had put full fat milk into a resident's cup of tea (when the resident preferred semi-skimmed milk) fails to deal with my explanation that I did so, not from spite, but because there was only full fat milk available.' We also accept her witness statement evidence on balance:

> 125. She was asked "when JO is on do you get semi skimmed milk?" to which she responded "yes, some of the time".
>
> 126. I would respect the choice of residents who wanted semi-skimmed milk. There are occasions when there is none and there are only other types of milk to hand. On those occasions, I have given the residents the available milk rather than none. I have never instructed anyone to deny a resident semi skimmed milk when it was available. Why would I do such a thing? I recall telling a member of staff that a lady resident couldn't have semi skimmed because we didn't have any. I drink semi-skimmed milk in my tea. There have been occasions when I have gone to the shop especially to purchase semi-skimmed milk when we had none.

67. We are also satisfied that the sub-allegation about the Appellant restricting choices about where residents sat contains a mistake of fact – there was no evidence in support of this. We find there was a mistake of fact based on the evidence.

68. However, we are satisfied that the sub-allegation that the Appellant would tell residents to shut up is proved and there was no mistake of fact in the DBS so finding.

69. The Appellant addresses it in broad terms in her grounds of appeal:

> b) that there was an insufficient evidential basis for finding that I had behaved in a disrespectful manner towards residents

Only one of two members of staff alleges that she personally heard (but not see) me shouting at a resident to "get back to her room".

Neither of the two staff members allege that they personally witnessed any other disrespectful behaviour.

70. We are not satisfied there was a mistake of fact in the DBS finding. This is for all the reasons set out in the DBS decision above and in Mr Serr's summary of the relevant evidence. The allegation was consistent and corroborated across a range of witnesses.

71. For example, at pages. 63, 65 and 67 of the bundle there is compelling evidence from an unnamed resident of this occurring. It is direct evidence and not hearsay. It is relevant (and inappropriate) conduct because it caused emotional upset and harm. There was substantial evidence in support from multiple additional and various sources of the manner in which JO conducted herself (not just former colleagues who are alleged to be malicious towards her).

72. We accept Mr Serr's submissions on this topic, as set out above, and the range of evidence to which he refers from the various witnesses. We also accept that it happened on various occasions that it was done deliberately or recklessly. We also accept that the Appellant would tell residents to go to their rooms as alleged. All six witnesses (including carers and residents) stated that she would tell residents to shut up and /or shout at them and /or tell them to go to their rooms.

73. We are satisfied that she was attempting to exercise an unprofessional degree of control over residents that was not reasonable and caused harm. We are not satisfied that the Appellant's denials in her interview with the employer and in her witness statement are reliable – we are not satisfied that the allegations were maliciously motivated.

74. We also accept the range of evidence that the Appellant did intimidate residents and on more than one occasions made them feel frightened and that she often raised her voice. We are satisfied that the sub-allegation that she made residents feel uncomfortable in their own home and more than that on occasion was properly proved and there was no mistake of fact in the DBS making these findings. The Appellant accepted that she can be loud and her denials in her witness statement are merely generalised assertion:

93. She [the witness] says that she has personally witnessed me raising my voice to residents.
94. I had occasion to speak loudly and clearly but I am never deliberately rude and I never shout.
95. She says JO has on occasion told residents to "shut up and go to their rooms"
96; I have never told a resident to "shut up". I would never ask a resident to go to his or her room
unless, for instance, they were isolating.

75. Again, we accept the range of evidence as referred to in Mr Serr's submissions above and the reasons given in the barring decision letter. This sub-allegation is

proved and there was no mistake of fact within it. Again, it is clearly relevant conduct that would and did cause emotional harm to residents.

76. In terms of mitigation for the findings of relevant conduct which remain undisturbed, this is difficult to determine as the Appellant does not accept the conduct occurred so demonstrates no insight or remorse. It might be said that the Appellant was having to take management responsibility but without support or with no authority. Perhaps more importantly, it may also have been that the Appellant was very stressed by the extreme pressures faced by care homes operating under COVID and was only put in charge through her seniority and experience. While she may have been entitled to be aggrieved, her response was not professional. We also accept the point that the DBS recognises – the Appellant had a long and otherwise unblemished record as a care worker (the DBS properly considered this in relation to her credibility and propensity as to misconduct).

77. We therefore find that there was no mistake of fact in the, arguably more serious, parts of the finding of relevant conduct in relation to allegation 3:

    that on various occasions in her employment, the Appellant made residents feel uncomfortable in their own home and talked to residents in an inappropriate manner by telling them to shut up.

78. However, we find that there was a mistake of fact in the parts of the finding that:

    on various occasions in her employment the Appellant prevented residents from making choices about food or where they sat.

Mistakes of law

79. We are not satisfied that there were any mistakes of law in the DBS decision.

80. The three 'error of law' grounds of appeal can be dealt with briefly.

    a) The DBS did not consider whether the evidence against me proved the misconduct alleged against me but appears instead to have considered whether the evidence I submitted (and the submissions made by my solicitor on my behalf) proved that the evidence of witnesses against me was false- the DBS's starting point was that I was guilty unless I could prove that the allegations were false

81. We are not satisfied there was any error of law as alleged. At all times the DBS applied the correct burden of proof in considering whether it was established on the balance of probabilities that the Appellant had committed the relevant conduct. It did not reverse the burden of proof but recognised the burden was upon it in making the barring decision to find the allegations proved.

    b) The DBS did not treat the evidence of my exemplary record as a carer as evidence which tended to prove that I did not commit the misconduct alleged; instead it

appears to have treated that evidence as being capable only of mitigating it's peremptory finding of misconduct.

82. We are not satisfied there was any error of law as alleged. The DBS took into account all relevant evidence including supporting or corroborative character evidence when making its findings (and her good character went to her propensity to misconduct and credibility). It considered but rejected the character evidence (including the Appellant's long and unblemished record and testimonials from colleagues) within its barring decision process document. It gave rational reasons for rejecting the reliability of her evidence and these outweighed the weight of any witness evidence (see for example page 135 of the bundle):

> It is acknowledged that JO's actions would appear to be out of character based on the testimonials received. Her current line manager was particularly complimentary about JO. However her current work appears to be in domiciliary[1] rather than residential care which would limit her contact with service users and other staff and is a completely different role to residential care. In addition, it is unclear how JO's character references knew of the allegations made against her and that at least one of them concluded that it was malicious and that residents had been encouraged to complain by those carers. It would appear likely that this information was given to them by JO and is not based on their knowledge of events.

c)The DBS failed to have regard to the principle that any finding of very serious, and thus unusual and inherently unlikely, misconduct, requires evidence of a commensurately cogent nature.

> *"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. (Lord Nicholls in re H (Minors) [1996] AC 563 at 586)*

83. There was no error of law on the part of the DBS in this regard. There is only one standard of proof and the DBS correctly applied it – the balance of probabilities. The cogency of the evidence and weight to be given is a matter for the factual assessment of the DBS and thereafter for the tribunal on appeal. We have considered the cogency of the evidence in relation to allegations 3 and 1 and have concluded that there were mistakes of fact in the DBS's findings in relation to allegation 3 and parts of allegation 1.

[1] The DBS's view of the nature of domiciliary care (in the context of the testimonial from the Appellant's subsequent employer) is inaccurate, although it is not material to the ultimate decision. Domiciliary care is in essence similar tasks to those involved in residential care but being carried out with no direct supervision in the client's own home. If no complaints have been made to the care provider, this suggests that JO is generally respectful of clients in their own homes.

Conclusion and Disposal

84. We conclude for the purposes of section 4 of the Act that:

    a) There were no mistakes of law in the DBS's barring decision (to include the Appellant on the ABL).
    b) There were mistakes by the DBS in some findings of fact which it made and on which the barring decision was based. There were no mistakes of fact on other findings upon which the decision was based and which did constitute relevant conduct. Specifically:
        1) There was no mistake of fact in the DBS's finding on allegation 1 that that on various occasions in her employment the Appellant made residents feel uncomfortable in their own home and talked to residents in an inappropriate manner by telling them to shut up. There was no mistake of fact in finding this constituted relevant conduct.
        2) There was a mistake of fact in the parts of the DBS's finding on allegation 1 that on various occasions in her employment the Appellant prevented residents from making choices about food or where they sat. These parts of the allegation were not established on the balance of probabilities.
        3) There was a mistake of fact in the DBS's finding on allegation 3 that the Appellant instructed carers not to give food or water to two residents who were receiving end of life care. This allegation was not established on the balance of probabilities.

85. For the purposes of section 4(6) of the Act, having found that DBS has made some mistakes of fact, we remit the matter to DBS for a new decision based upon our findings. It must decide whether it is appropriate and proportionate to include the Appellant on the ABL in light of the findings of relevant conduct which we have upheld (parts of allegation 1).

86. It would not be appropriate for us to direct removal of the Appellant from the list in circumstances where there remain findings of relevant conduct (parts of allegation 1). The DBS is entrusted with the expert decision making as to assessment of the risk posed and the appropriateness of barring in light of the relevant conduct established.

87. The appeal is allowed in part and the case remitted with the direction as set out above.

88. We make some further observations on the DBS's case.

89. The first is that Allegation 1 contained multiple allegations of relevant conduct and it would have been preferable if it had been sub-divided into specific sub-allegations so each could have been considered separately and independently by the decision-maker in the DBS and the tribunal.

90. Secondly, we accept that there was no error in the DBS's failure to obtain other evidence or obtain disciplinary records or interview other residents or co-workers in this case. There is no statutory or common law duty to pursue all reasonable lines of enquiry – only the public law duty for it to act rationally and in good faith when obtaining evidence and relying upon it. We were given no evidence of the size of the care home or number of residents or co-workers. Nonetheless, we can take into account the absence of evidence when deciding whether there is a mistake of fact by the DBS. In future cases, it would assist if the DBS confirms whether it has used its best endeavours to pursue all reasonable lines of enquiry pointing towards and away from the case it alleges against a barred person and confirms whether it has taken reasonable steps to obtain all relevant evidence. What is relevant and reasonable will depend on all the facts of the case including the seriousness of the allegations and the nature or sources of the potentially available evidence.

Authorised for release: Judge Rupert Jones
Judge of the Upper Tribunal **Dated: 12 July 2023**

The lists and listing under the 2006 Act

1. 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").

2. 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.'

Vulnerable adults' barred list

3. 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.

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

5. 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’).

6. 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.

7. 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.

8. 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.

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

10. 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.

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

12. 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

13. 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 <u>DBS has made a mistake —</u>

<u>(a) on any point of law;</u>

<u>(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.</u>

(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]

14. 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. 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]-[103] of the judgment in *R v (Royal College of Nursing and Others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin) ('*RCN')*:

'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.'

15. It flows from this that an appeal to the Upper Tribunal can only succeed if the DBS made a mistake in fact in making a finding upon which the decision is based or made a mistake in law in any way in making its decision – see section 4(5) of the Act.

Mistake or error of fact

16. 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. These are all errors of law that might be committed in relation to a factual finding.

17. 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 finding upon which a decision is based. This type of mistake of fact might arise 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.

18. 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.

19. The Upper Tribunal must begin by examining the DBS decision and deciding whether it made any mistakes when finding the facts (such findings will have been made based on the documentary material available to it). However, the Upper Tribunal may also make its own fresh findings of fact having heard all

potentially relevant evidence and witnesses during the appeal process by which it may determine whether the DBS made a mistake of fact which was material to the making of its decision.

20. The extent of the jurisdiction for the Upper Tribunal to determine mistakes of fact by the DBS and make its own findings of fact was outlined 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.’

21. The recent judgment of the Court of Appeal in *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575 (‘AB’), addressed the Tribunal’s fact-finding jurisdiction when remitting cases to the DBS having allowed an appeal:

‘55. The Upper Tribunal also made findings of fact and made comments on other matters. Section 4(7) of the Act provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made (on which DBS must base its new decision)". It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind.

First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter.

By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually-supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact.

Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, Upper Tribunal would have to have sufficient evidence to find a fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.'

Appropriateness

22. On an appeal, the Upper Tribunal ('UT') must confirm the DBS's decision unless it finds a material mistake of law or fact. If the UT finds such a mistake, it must remit the matter to the DBS for a new decision or direct the DBS to remove the person from the list.

23. Under section 4(3) of the Act, the decision whether or not it is "appropriate" for an individual to be included in a barred list is "not a question of law or fact". Section 4(3) of the Act therefore provides that the appropriateness of a person's inclusion on either barred list is not within the Upper Tribunal's jurisdiction on an appeal. Unless the DBS has made a material error of law or fact the Upper Tribunal may not interfere with the decision - *RCN* at [104]:

'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.'

24. The fact that the appropriateness of barring is not to be examined as an error of fact in the light of section 4(3) of the Act was recently reiterated in *DBS v AB [2021] EWCA Civ 1575*. The Court of Appeal explained the nature of the Upper Tribunal's jurisdiction at [67]-[68]:

'67. The context, and the nature of the statutory scheme, is that it creates a system for the protection of children and vulnerable adults. It provides for an independent body, the DBS, to determine whether specified criteria are met and, in the case of paragraph 3 of Schedule 3 to the Act, that it is appropriate to include a person's name in the children's barred list or the adults' barred list. There is a safeguard for individuals in that they may appeal to the Upper Tribunal on the basis that the DBS has made an error of law or fact. The Upper Tribunal cannot consider the appropriateness of the decision to include or retain the person's name in a barred list when deciding if the DBS had made such an error. If the DBS has not made an error of law or fact, the Upper Tribunal must confirm the decision of the DBS (section 4(5) of the Act). Only if the DBS has made an error of law or fact, can the Upper Tribunal determine whether to remit or direct removal of the person's name from the list (section 4(6) of the Act).

68.The scheme as a whole appears, therefore, to contemplate that the DBS is the body charged with decisions on the appropriateness of inclusion of a person within a barred list. The power in section 4(6) of the Act needs to be read in that context. The context would not readily indicate that the Upper Tribunal is intended to be free to decide for itself questions concerning the appropriateness of inclusion of a person in a barred list. It is unlikely, therefore, that section 4(6) of the Act was intended to give the Upper Tribunal the power to direct removal because it, the Upper Tribunal, thinks inclusion on the list is no longer appropriate. It is more consistent with the statutory scheme that the power is to be exercised when the only decision that the DBS could lawfully make would be to remove the person from the barred list.'

25. Therefore, the DBS is empowered and required to make a judgement as the expert body appointed by Parliament, whether the relevant conduct is such that, in all the circumstances, makes it "appropriate" to include the individual in the CBL. In so doing it will normally take into account a risk assessment, that it performs in relation to the individual it proposes to bar. However, the DBS concedes that the rationality and proportionality of any risk assessment it conducts can be challenged as having been made in error of law.

Mistake or error of law

26. 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 or hearing (in the rare circumstances where it considers oral representations).

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

Proportionality

28. The UT is not permitted to carry out a full merits reconsideration of, or to revisit, the appropriateness of R's decision to bar; but it does have jurisdiction to determine proportionality and rationality in relation to the DBS's judgment as to the risk that a barred person poses and whether they should be included on the list, according appropriate weight (in so doing) to the DBS's decision as the body particularly equipped, and expressly enabled by statute, to make safeguarding decisions of this specific kind (e.g. B v Independent Safeguarding Authority (CA) [2012] EWCA Civ 977, [2013] 1 WLR 308 ; *Independent Safeguarding Authority v SB (Royal College of Nurses intervening)* [2012] EWCA Civ 977; [2013] 1WLR 308 ('B').

29. Maintenance of public confidence, in the regulatory scheme and the barred lists, will "always" be a material factor when seeking to balance the rights of the individual and the interests of the community (e.g. B). 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 proper weight to the view of the DBS as it is enabled by statute to decide appropriateness - see the Court of Appeal's judgment in B 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)).'

30. In summary, questions of the proportionality of DBS's decisions to include individuals on the barred lists 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?

31. 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

32. The burden of proof is upon the DBS to establish the facts and relevant conduct upon which it relies in making its decision. Thereafter the burden is on the Appellant on the appeal to establish a mistake of fact. 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).