IE v Disclosure and Barring Service – Safeguarding – DBS
[2023] UKUT 310 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001212-V**
ADMINISTRATIVE APPEALS CHAMBER **(formerly V/423/2021)**

ON APPEAL FROM:
Appellant: IE
Respondent: Disclosure and Barring Service
DBS Ref No: DBS6191
Customer ref: 00925681485
DBS ID Number: P0002C3Z240

Between:

IE

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

Before: Upper Tribunal Judge Jones
Tribunal Member Roger Graham
Tribunal Member Rachael Smith

Hearing date: 15 May 2023
Decision date: 14 July 2023

Representation:
Appellant: Louise Price of Counsel
Respondent: Mr Simon Lewis, Counsel instructed on behalf of the DBS

DECISION

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

The decision of the Disclosure and Barring Service to include the Appellant's name in the Adults' Barred List taken on 18 August 2020 did not involve a

mistake on a point of law nor material mistakes in findings of fact. The decision of the DBS is 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, witnesses, complainants or any person who has been involved in the circumstances giving rise to this appeal.

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

Introduction

1. The Appellant (IE) appeals the decision of 18 August 2020 of the Respondent (the Disclosure and Barring Service or 'DBS') to include his 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 following an oral hearing on 12 July 2022 in respect of four grounds raised by the Appellant in the notice of appeal.

3. We held an oral hearing of the appeal in Field House, London on 15 May 2023. The Appellant attended and was cross examined. He was represented by Ms Price of counsel. The Respondent DBS was represented by Mr Lewis of counsel. We are grateful to them both for the quality of their written and oral submissions.

The background

4. References in square brackets ([]) are references to page numbers of the hearing bundle which we considered in full.

5. The Appellant worked, from early March 2018 as a "senior support worker", at a home which provided residential supported living services to people with learning disabilities and other complex issues. It is accepted that this was regulated activity.

6. The Appellant's duties included the provision of care to a number of service users residing at the Home, including one particular service user ("SS"). SS had a learning disability and bipolar affective disorder; and a history of abuse, including sexual abuse, as a child.

7. On 03 February 2020, the Appellant was suspended ([63]) pending completion of an investigation by his employer into alleged misconduct at work, relating to the way the Appellant dealt with SS and, in some more limited respects, other residents at the Home.

8. As part of the employer's investigation, a number of IE's colleagues ("the Colleagues") produced statements and/or had discussions recorded ("the Statements"), setting out their accounts regarding the alleged misconduct.

9. On 12 February 2020, a formal referral was made to DBS, by the Home, about the alleged misconduct [32]. At or around the same time, the police were also notified by the Home, of the alleged misconduct. The Home also notified the Care Quality Commission and the local authority [35]-[37]. No other authority has taken any action in relation to the Appellant's suitability to work with vulnerable adults in light of the allegations (or at all).

10. On 31 March 2020, DBS sent the Appellant a "Minded to Bar Letter" ([19]), setting out the allegations being considered by DBS, various information relating to the same and to the procedure being undertaken; and providing IE with the usual opportunity to make written representations and/or provide information or evidence to challenge DBS's putative findings and/or to explain why he ought not to be included in the List. It was made clear to IE that, should he wish to rely on additional documentation from a third party, it was his responsibility to provide it.

11. It would appear that IE was interviewed by the police, in relation to the same or similar matters, in May 2020 ([84]), after which CPS appear to have spent some considering whether or not to bring criminal proceedings against IE.

12. On 17 July 2020, written representations were duly provided to DBS, on behalf of IE, by his solicitor ("the Representations") ([67-81]). Attached to the same, were a number of other documents, including three "character references" ("the Character References") ([88-91]).

13. The DBS then made the barring decision on 18 August 2020 ('the Decision'). The Decision is to be read in conjunction with the "Barring Decision Process" document ("the Rationale Document") [(132]).

14. It would appear that the police/CPS, ultimately, elected not to take any further action against IE regarding any criminal liability ([128]).

15. The Appellant's Application and Notice of Appeal, setting out IE's reasons for appealing the Decision, was dated 18.11.20, having been prepared by a solicitor on IE's behalf ([1]). It appears to have been stamped as received by the Upper Tribunal ('UT') on 15.03.21; but is understood to have been emailed to the UT on 18.11.20 by IE's representatives.

16. The UT issued a first set of directions in respect of the appeal on 30.03.21 ([130]).

17. DBS filed and served some written submissions dated 29.05.21 ([168]).

18. IE provided some further written submissions on 26.08.21 ([211]).

19. The UT issues a second set of directions on 25.10.21 ([215]) and granted permission on four grounds of appeal to appeal following an oral hearing on 12 July 2022.

Rule 14 order - Anonymity

20. The UT has already made Orders under Rule 14 on 25 October 2021 relating to the non-identification and anonymisation of the Appellant, complainant and witnesses in this appeal together with the non-disclosure of information. Those orders continue to apply and have the effect set out in bold at the beginning of this decision. The Appellant is referred to by the cipher IE and the witnesses are also referred to by two letter ciphers.

The Barring Decision subject to appeal

21. The allegations considered by DBS are set out in full in the Decision [9B] and in the Rationale Document [135-146]. There were nine allegations ("the Allegations"). DBS came to the conclusion, on the balance of probabilities, on the documentary material before it, that each of the Allegations was proven and constituted findings of fact.

    Allegation 1: woke service users unnecessarily and using inappropriate methods (pulling off covers, turning lights on/off, kicking beds, shouting names)
    Allegation 2: made SS stand or sit in silence for prolonged periods
    Allegation 3: removed personal belongings to punish or procure good behaviour
    Allegation 4: used or threatened to use, or discussed cigarette lighters, knowing SS was scared of them, in order to procure good behaviour
    Allegation 5: used inappropriate force on SS: (a) pushing him up the stairs to his room; (b) unauthorised restraints by holding his arms down
    Allegation 6: threatened to call the police on SS
    Allegation 7: made SS stay inside his room (numerous occasions)
    Allegation 8: instructed SS to say good morning to each staff member and to speak properly and stand up straight when doing so
    Allegation 9: removed or delayed food from SS, to procure good behaviour

22. Having found the nine Allegations proven, DBS came to the further conclusion that IE had engaged in "relevant conduct" in relation to vulnerable adults, within the meaning of the Act, specifically conduct which harmed or endangered a vulnerable adult or was likely to harm or endanger a vulnerable adult.

23. DBS then came to the further conclusion that it would be appropriate and proportionate, in all the circumstances, to include IE on the List for the reasons it set out.

Appellant's Grounds of Appeal

24. In his Grounds of Appeal (his "Reasons for Appealing" document) enclosed with his notice of appeal, the Appellant provided six grounds of appeal drafted his solicitors.

25. The Appellant relied on four grounds of appeal at the hearing of the permission application on 12 July 2022.

26. Permission was granted on all four grounds by Upper Tribunal Judge and the permitted grounds were then served as perfected grounds. They are:

    i) Mistake of fact – the DBS has inaccurately interpreted or recorded evidence;
    ii) Mistake of law - that the findings of relevant conduct were irrational – relying on similar argument that the DBS failed to take into account relevant evidence;
    iii) Mistake of law – the disproportionality of the barring decision;
    iv) Mistake of law – that the DBS did not seek further documents from the Appellant's former employer and there was procedural irregularity in the barring decision.

27. In relation to ground i), the alleged mistake of fact falls into three categories:
    a. the DBS's failure to consider the weight of evidence that undermined the credibility of its witnesses;
    b. the DBS's failure to consider adequately evidence that supported the Appellant's denials; and
    c. the DBS not adequately considering the inadequacy of the internal investigation of the Appellant's former employer.

The evidence in the appeal

27. The DBS relied on written evidence from nine witnesses contained in their bundle of evidence. These were all former colleagues who were employed by the home at the relevant time. There were no statements provided by the residents themselves. This was the evidence relied upon in making the barring decision and in defending the appeal. The relevant evidence is referred to in the discussion section below and we make findings of fact based upon it and the Appellant's evidence.

28. The Appellant provided a detailed 10-page witness statement dated 22 December 2022 (p. 239-248) signed with a statement of truth. He also relied on other evidence he had supplied to the DBS which were contained in the hearing bundle. The Appellant was cross examined during the hearing and denied all the allegations. It goes without saying that this written and oral evidence was not available to the DBS when making its barring decision.

29. Again, we make findings of fact in relation to this evidence in the discussion section below – we have come to the conclusion that his written statement as set out below and his oral evidence were not substantially reliable nor credible for the reasons we will give.

30. Despite our findings, that the evidence given denying the nine allegations is not wholly reliable nor credible, we reproduce the Appellant's witness statement in full as follows:

2. I started at [X] Homes in 2018. Initially I completed three days voluntary shift work at Service 39 so that they could monitor my performance before confirming my position employment. After these initial three days I moved to Service 42 where I worked 3 days a week. I was then moved to service 72 for around two to three months. Around 3 to 4 months later, a senior carer position became available at service 39. My manager recommended me to the position. I moved back to service 39 where I was monitored and trained by the senior to fulfil the new role. I then split my time equally between service 39 and service 72. I worked at service 39 on Monday and half day Tuesday. The other half of Tuesday and Thursday at service 72. Whilst I was senior at service 32 I was not senior at 72 as there was already a senior on shift on those days. I would just help support the 4 residents.

3. About 3 to 4 months before the allegation my shifts at service 72 were irregular because the company recruited more staff.

4. [X] Homes is a residential service provider supporting service users with learning difficulties and to support their everyday needs. ….

5. My working pattern did not change throughout my employment at the company. I worked Monday to Thursday 7am to 10pm. I was a senior carer at Service 39 from around June/July 2018 until the time I was suspended in 2020. At the time I worked at Service 39, there were 9 service users residing at the home.

Allegation 1:
Between March 2018 and February 2020 on regular occasions, you whilst conducting handovers for both and day and night shifts, woke service users unnecessarily and used inappropriate methods to do so, specifically:
- **Pulling off their covers/duvets**
- **Turning the light on and off**
- **Kicking the beds**
- **Shouting their names**

6. I deny all the inappropriate behaviours alleged. I very rarely, if at all, was required to wake the service users. If ever there was a need for me to do it, I would do so respectfully and with dignity to the service users.

7. I have only ever been employed at the company as a member of the day staff. My shift would begin at 7am and end at 10pm. At service 39 I was the only senior on shift and was supported by 2 care staff but one of which worked one to one with SS. The night staff had a routine whereby they would wake the service users before the arrival of the day staff. They routine had been in place since before I began at the company and continued throughout my time there.

8. I would usually arrive at work around 6:30am ready for my shift to begin at 7am. The night staff's morning routine would be to wake all service users before day staff arrived to take over. Whenever I arrived, most of the service users, were dressed and waiting in the lounge for their breakfast to be given by them by day staff. When my shift began I would go straight to the staff table located in the lounge. I would greet the service users already in the lounge and wait for the night staff to finish dealing with them before conducting the handover.

9. The only service users that would remain in their bedroom were GB, MS and JP. Although they would stay in the bedroom longer, they were all still awake.

10. GB had mobility issues and required two members of staff to support him getting out of bed. The night staff would wake him in the morning, but he often liked to stay in bed. When he was ready to get up, he would call for staff to help him.

11. MS also liked to stay in bed until he was ready to get bathed. He had capacity and would communicate to the staff when he was ready to get up for the day. If this fell on our shift, the supporting care workers would assist.

12. JP had difficulty of hearing, but he was fully mobile. The night staff would wake him, and he
would get himself a cup of tea and return to his bedroom. He would often lock the door behind him. When staff needed get access to his bedroom, we would have to knock very loudly several times for him to hear us and let us in.

13. The support staff would tend to the service users still in bed whilst I prepared breakfast for the those in the lounge. I would only attend the service users in the bedrooms in the morning if for instance my assistance was specifically required. If I were ever required to assist with getting these S[ervice] U[sers] out of bed I would never have done some in the manner alleged.

Allegation 2:
Between 11 March 2018 and 4 February 2018 on numerous occasions you made Mr SS, a service user in your care stand or sit in silence for prolonged periods of time.
14. I have never made SS stand or sit in silence for any length of time.

15. SS was quite a volatile service user with complex needs. He was a difficult individual that could not be made to do anything that he did not want to do. Trying to make SS stand or sit in silence against his will for any length of time would be impossible and would certainly have triggered a violent outburst. I was SS's key worker and was responsible for assessing his needs, reviewing his progress and performance, and identifying any risks or other issues. I conducted these reviews annually.

16. As SS' key worker I was fully aware of the extent of his volatility and his triggers. My focus on shift was ensuring the safety and wellbeing of the service users and I would never have put myself, the staff, or others service users at risk of harm by knowingly triggering SS. My aim was for each shift to go smoothly. I would never create that situation for myself or for others.

17. SS required 1 to 1 support. He had a dedicated member of staff that was tasked to stay with him all day and see to his everyday needs. I would only be required to get involved with SS during meal times or if his care worker required support, but I don't recall this ever occurring.

18. During my time at the company SS's one-to-one care workers were HI, CT and RP.

Allegation 3:
Between 11 March and 4 February 2020 on frequent occasions you removed personal belongings from Mr SS, a service user in your care, as a form of punishment and/or to procure good behaviour.
19. I have never taken a service users' belongings without their knowledge or consent and is not something I would ever encourage as behavioural management if it was not stipulated in their care plan. I only ever worked in accordance with the service user's care plans to give them the best care they required.

20. The only time that some of SS's belongings may have been taken away was at Christmas time. The care staff would go through the service user's belongings periodically to discard old items to make room for the new things. However, staff worked with the service users to do this. This was a task that the home had undertaken and was not something that I introduced.

21. During my time at the service, I did not encounter issues with SS that required me to manage his behaviour. This was the responsibility of his 1 to 1 care worker. I would not be expected to get involved unless he was a danger to either himself or another person. Regardless of this, taking SS's belongings to manage his behaviour was not an agreed method in his care plan and was not something that I would have recommended anyone to do as this would likely have led to risk of harm to staff, other services users and himself.

22. Part of SS needs was a structure to his daily routines. A timetable was put together for him in accordance with his care plan. His 1 to 1 worker would follow the same daily routines that included: taking SS out into the community every day from around 11am to around 5pm. For a large chunk of the day SS would not be at the service.

23. SS had quarterly assessments that were carried out by Dr M. She would assess his progress and provide guidance and advice on how to manage certain things. On each occasion she attended she passed comment on the positive progress SS was making in every aspect of his life. There were no concerns raised to her about his treatment and nothing that she would have picked up on in his behaviours and his progress.

24. Although I was not involved in the daily care of SS I still ensured he was cared for properly and in accordance with his needs. For instance, limiting the use of PRN. PRN is a medication that weakens the muscles and was given to service users when they were agitated. PRN was advised for use in SS care plan only when uncontrollable. I noticed that staff were administering PRN to SS whenever he displayed any signs of distress. I didn't agree with this and educated the staff in understanding the various levels of agitation and the circumstances that PRN would be most appropriate and not just whenever he was shouting. This is an example of me working in the best interests of SS and not just doing what was easy behavioural management.

Allegation 4:
Between 11 March 2018 and 4 February 2020 on numerous occasions you, whilst providing care for Mr SS, used or threatened to use, or discussed cigarette lighters, knowing Mr SS was scared of them, in order to procure good behaviour.
25. As I was SS's key worker I was fully aware that SS had issues with things that were hot, namely,
lighters, the gas cooker, and radiators. This had always been clearly marked in his care plan. At no point did I ever use his fears against him. I have never pulled out a lighter in front of

him or discussed lighters. I do not smoke and would have no reason to carry a lighter around.

26. My approach to dealing with this was ensuring that the staff were aware not to allow SS to sit next to radiators when they were on, to be present with SS and his care worker in the kitchen and by also ensuring that those who smoked, did so away from SS and out of sight. The only staff that I was aware that smoked was CB and CT. The agreement was that on the occasions either of them were his dedicated care worker for the day, they were only allowed to smoke if some other qualified staff member was able to oversee SS in their brief absence. If they were taking SS out for the day, they were instructed not to smoke at all.

27. From my knowledge RP did not smoke and therefore there was no requirement for me to discuss this with him. However, RP was fully aware of SS issues with lighters by virtue of SS care plan. At no point did RP ever witness me using a lighter or discuss lighters in front of or around SS.

Allegation 5:
Between 11 March and 4 February 2020 on numerous occasion, whilst providing care to Mr SS, you use inappropriate physical force towards him, specifically:
- **Pushing him up the stairs to his bedroom**
- **Using unauthorised restraints by holding his arms down**

28. I did not have any issues with SS during the time I worked at the home that would have required me to get involved with him to this extent. Regardless, I was strict with my approach with SS because of the risks involved. I only ever ensured his 1 to 1 care worker was enforcing his care plan for the safety of other service users and the staff.

29. SS is an individual of large build and was a lot taller than I. I would not have physically been able to restrain him. Restraint was not a technique that was used on the service users nor was I trained in restraint techniques. If SS ever displayed any requirement to be restrained this is when the PRN medication would be administered.

30. If this ever did occur, SS would have screamed and alerted other staff members, and I would not be able to do this alone.

Allegation 6:
Between 1 March 2018 and 4 February 2020 on numerous occasions you, whilst providing care to SS, threatened him by telling him he would call the police on him.
31. I have nothing to add to this allegation that has not already been addressed in my representations as it did happen.

Allegation 7:
Between 11 March 2018 and 4 February 2020 on numerous occasions you, whilst providing care to SS would make him stay inside his bedroom.
32. As with the other allegations, I deny this completely. SS' movements were never restricted as far as I am aware and never had been. None of the service user's movements were restricted. The only occasion that SS might have been confined to his bedroom is if he was having an episode however, this did not occur on any of my shifts. Confining SS to his bedroom against his will would have caused him significant distress and would trigger him cause him to become aggressive.

Allegation 8:

Between 1 March 2018 and 4 February 2020 on occasions during handover when Mr SS was present in the lounge, you instructed him to say good morning to each staff member and told him to speak properly and stand up straight whilst doing so.
33. I only ever encouraged the staff to greet the service users when they arrived at work with particular focus on SS. I did not ever encourage or force the service users or SS to greet the staff by return. That was a choice of the service users.

Allegation 9:
Between 11 March 2018 and 4 February 2020 on numerous occasions whilst providing care to Mr SS you would remove food from him or delay the provision of food in order to procure good behaviour from him.
34. Managing SS behaviour was not my day-to-day responsibility. Every so often I ensure his care plan was correct and up to date but other than this, it was the responsibility of his 1 to 1 care worker to ensure SS needs were being met and his daily routine was being followed. Keeping SS to a routine would often ensure his contentment.

35. There were no delays with SS meals that were within the staff's control. SS liked to have an exact time that food would be served and if for any reason the food was delayed, SS would be given a snack to keep him occupied. All the service users would be informed when food was ready and invited to sit at the table to eat. Often SS was served first because he could become impatient, and his impatience could lead to distress followed by aggression. Outside of a meal not being ready on time, SS' meals were never delayed or withheld.

36. Meal times were an awkward time. There could be up to Six residents sat around a dining table only really suitable for four people. The residents were sat very closely together. SS would sit in front of GB and next to MS. MS had a condition that affected his ability to swallow. This often-caused MS to cough violently and even be sick. If MS started violently coughing, the staff, myself include would ask the service users to move their plates out of the way to prevent particles landing on their food.

37. SS may not do it straight away but eventually he did and sometimes he would just respond by telling MS to stop coughing. The other staff members or I would only step in and physically move SS' plate if it was likely that MS was going to vomit. When this happened, SS would be informed what we were doing and why we were doing it and it was only ever for as long as was necessary whilst MS was being moved away. SS loved his food and so if his plate was taken away for too long he would get angry. Similarly, if we moved his plate without first explaining it to him. SS plate would then be put back down immediately. Even in these circumstances SS plate was not taken away from his sight it was only moved to the side. There has never been any other occasion that SS's plate has moved.

38. Every member of staff regardless of who they were and their job role, had a duty to record every incident witnessed and report all safeguarding concerns. At no point, that I am aware off, did any colleague record or report any of the concerns their concerns.

Animosity between staff members
39. There was definitely a divide between staff members for a number of reasons. One being the family relationships between staff and the management/directors but also a clash in work ethic.

40. The biggest issues I had with some of the staff was them not following instructions or being pulled up if they weren't performing properly. The main staff that always gave me problems with this were CB, MN, HI and SB. They constantly got defensive and would claim that I was discriminating against them because of their colour or religion which was not the

case at all. I only tried to manage them as I was employed to do and ensure the standards expected of management, the service users and their families were maintained. There were often issues with the staff not cleaning properly.

41. In particular I had reported HI and SB for incidents involving service users. HI was moved to a different service as a result and SB was moved to work with me for half a day on Mondays. I was aware that other staff did not like working with me and some avoided working with me where they could because of my work ethic. CB was among these colleagues.

42. My approach to my job role was that I was going into the service user's home, so I treated it and them with respect but also I didn't want to give management any reason to criticise my work or the work of the staff under my supervision and jeopardise my position. I was not afraid to pick people up where they were slacking. Cleaning was a big issue in the home and often staff either did not do it or did not do it properly. This was an issue I noticed more with the night staff. I regularly picked them and others up on this and other issues and included it on their supervision reports.

Colleagues
43. There were a number of staff that were interviewed and provided statements for the internal investigation that I did not work with regularly, had not worked with for a number of months or had not worked with at all.

44. There was also a number of staff that I also worked with but who were not interviewed. This being Z, N, G, S, U and Z between services 39 and 72. However, neither of these were contacted during the investigation for their knowledge or insight into my conduct with service users. G and N did leave the company in late 2019 however, I worked with them regularly prior to this.

45. The staff I had not worked with for a number of months leading up to the allegations being made were CB, HI and CT. They had either moved to a different service or changed their shift pattern the previous year.

46. HI moved to a different service in June or July 2019 after I reported him to management following an incident with a service user. However, even when he was based at service 39 he was a one-to-one carer for SS and so I did not have very many dealings with him. CT was moved to service 42 in 2019 following an incident with a service user that I had reported him for. Prior to this I worked with him once per week for only a couple of months. In relation to CB, I worked with her once per week in 2018 and only some of 2019. We worked well together in the beginning, but her performance started to slip, and I was beginning to pick her up on things. She then changed to working nights in 2019. I only had any dealings with her then during handover when my shift began or ended. If there were issues within the home when I started my shift I made sure she and/or the other night staff resolved them before they left. She did not like this or being told about her performance. I had no end of issues with her because of this.

47. I had never worked with MN and have only worked with AA three times over the course of my employment. One of those occasions I was tasked to supervise AA for one shift so that I could assess her capabilities of performing the job properly. Unfortunately, AA was unable to carry out basic duties and so I recommended to management that she was unable to fulfil the job role. I do not know what happened to her position within the company following this. The only time I encountered MN was during handover either at the start or end of my shifts as he worked nights with CB. MN was amongst the staff that I picked up on

performance issues regularly. Particularly with his standards of cleaning. Similar to CB, I made sure they had completed all tasks prior to leaving the premises. Also, on a few occasions I had a word with MN as I had suspected he had been eating the service user's food whilst on shift.

48. Of the staff that were interviewed it was only RP, CO and SB that I worked alongside weekly. However, RP was a one-to-one carer for SS and so SS's daily routine meant that we didn't have many dealings with one another. CO and I worked well together although the usual standards of cleaning could be an issue however, she was much more receiving of this than the others. She wouldn't complain if I delegated her tasks to do or asked that re-do something. SB on the other hand I don't believe liked
working with me at all. She had only been put onto my shift for half day on Mondays around 6 months prior to the allegations because I had reported her for an incident whereby she and another member of staff had left a service user unattended all night. I started my shift on that occasion to find the service user covered in dry faeces.

Events leading up to the allegations being made
49. The Monday before CB and MN made these allegations I had left a note for the night staff on Monday evening to clean a certain room during their shift. The night staff that evening happened to be MN and CB. When I started my shift the following day I saw the area dirty and that my note had been ignored. The Manager had also raised an issue with the state of this room. I informed them that I had left instructions for the night staff to clean that area.

50. I next saw CB and MN during the handover on Thursday evening. I confronted them both about not following my instructions. I asked them to give me one reason why I should not put them both on supervision. Supervision is a warning that is handed to management to consider taking further action or not.

51. In response to this CB started accusing me of always picking on her and MN and singling them both out. I assured them this was not the case and I pull anyone up who is not doing their job properly. I explained that they weren't doing what was expected to be done and leaving it for the day staff to manage which was not fair. I told them both that I would be back on Monday and would be putting them on supervision. They were shocked. CB wasn't happy at all. She was swearing at me telling me to "fuck off". MN was comparing me to other seniors and how I wasn't like them, this went on and on. Eventually I just left because my shift had already run over by 30 minutes.

52. Being placed on supervision would have damaged CB's chance of promotion to a more senior role within the company. CB had applied for G's senior carer position and was going through the recruitment process for this. She was being considered for the position and had already been interviewed for it at the time of this incident.

53. When I returned for my shift on Monday at 7am I noticed that management were in unusually
early and CB and MN had already left. Management informed me that allegations had been made and that I was being sent home. I was not told what the allegations were, only not to attend any of the services or to contact the company or the staff. I was informed they would be in touch with me in due course, but they were not. Since that day I have still not heard from [X] Homes. I was not given an opportunity to participate in the proceedings and did not receive any invite to an investigation meeting or disciplinary hearing and therefore had no opportunity to state my side.

54. Three months later I was contacted by the police and invited to attend a voluntary interview which I did. This was the first I learned about the nature of the allegations and was my first and only opportunity to answer to the allegations. The criminal investigation resulted in no further action. The only other time I have been contacted about these allegations is when I received notification from the DBS that I had been referred. I focused my efforts then on resolving both the criminal and DBS issue.

55. At no point have I abused or mistreated the service users. It is not within my nature. I treated every service user like the individuals they were, with respect and dignity and only ever in accordance with their care plans. The way I treated my role was that we were going into their homes and so it was important to me to ensure that their home was clean and tidy and that they were treated with respect and cared for properly.

Law

31. The relevant statutory provisions and authorities are set out in the Appendix to this decision.

32. The most relevant provisions to address within the body of the decision are paragraphs 9 and 10 of Schedule 3 to the Act on the definition of relevant conduct:

(a) Paragraph 9 of Schedule 3 to the Act, which sets out the provisions in relation to "relevant conduct". It provides that, following an opportunity for and consideration of representations, DBS "must" include a person on the List if: (i) it is satisfied that they have "engaged in relevant conduct"; (ii) it has reason to believe that they have been (or might in future) be "engaged in regulated activity relating to vulnerable adults"; and (iii) it is satisfied that it is "appropriate" to include them.

(b) Paragraph 10(1) of the same, which sets out the meaning of "relevant conduct". It includes: (i) "conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult"; (ii) "conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him".

(c) Paragraph 10(2) of the same, which provides that conduct "endangers a vulnerable adult if" among other things it: (i) "harms" a vulnerable adult; or (ii) puts a vulnerable adult "at risk of harm".

33. The most relevant authority to address within the body of the decision is on the extent of the jurisdiction for the Upper Tribunal to determine mistakes of fact by the DBS and make its own findings of fact. This 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 Appellant's submissions on the grounds of appeal

34. Ms Price presented the case expertly on behalf of the Appellant. She submitted as follows on each of the four grounds for which permission was granted.

Ground 1: Mistaken/Inaccurate findings of fact

35. She argued that the DBS fell into error in making findings of fact in two respects:
    a. the first was failure to consider the weight of evidence that undermined or put in question the credibility of the witnesses that made the allegation; and
    b. the DBS failed to properly take into account the evidence that supported the Appellant's denials.

36. She contended that both constituted material mistakes of fact.

Failed to consider the weight of evidence that undermined or put in question the credibility of the witnesses that made the allegations

37. She submitted that there were, even, on the papers very strong reasons to question the credibility of the witnesses. Throughout its decision-making document, the DBS concluded that there were no reasons to question the validity of the allegations or the credibility of those making the allegations.
    a. No reason to doubt the veracity of the records of the discussions or content of the statement [143];
    b. No reason to doubt the veracity of the evidence [144];

c. No reason to doubt the evidence to two staff members and no evidence to contradict their accounts, further the staff members appears credible and reliable [146];
d. No reason to doubt the veracity of the evidence [143];
e. There is no information contained within the case papers or representations to provide a motive to make false allegations against the Appellant [147]; and
f. There is no reason to believe MN would be dishonest about his account [148].

38. Ms Price argued that these conclusions are simply wrong and plainly mistaken. There was ample troubling evidence that cast doubt on the reliability of the witnesses who made the allegations and multiple reasons why they may not be accurate in their accounts, such that they amount to a clear material mistake of fact. Each reason is set out below in turn.

39. Absence of staff:

a. HI: 'I haven't worked there for a while. 'I left 39 last year' [61].

b. AA had only done a 'few shifts' '2 or 3 recently so I haven't seen them much' [60].

c. CT left the service the year previously according to the Appellant.

40. That the staff were protecting themselves: e. HI openly stated whilst seeking to blame the Appellant for his own conduct 'am I in trouble?' [61].

41. Allegations of staff conflict on race grounds: f. AA said 'There was a black v Asian race thing going on a year ago with [the Appellant] being leader. Its better now' [60]. g. CT also suggests there was a race divide with the Appellant on one side and SB (who was one of the witnesses who spoke against the Appellant on the other [62].

42. Staff disliked their supervisor (the Appellant) telling them what to do or staff wanted to avoid being performance managed:

a. RP said, 'some staff don't like being told what to do' [52].

b. CT suggested, 'he (the Appellant) has clashes with loads of staff' [62].

c. The two initial and primary complainants, CB and MN, were due to be performance managed by the Appellant on the day after they raised allegations.

d. Both the appeal in his representations to the DBS and one of his character witnesses who worked at the service stated there was an issue with the work of CB and MN's work.

e. This is verified by the complainants themselves. CB reports that the Appellant told her cleaning was not good enough [51]. She suggests there was a longer-term grievance between himself, CB and the Appellant. CB mentions in her grievance that despite her shift ending at 7am, the Appellant made the handover go on to 7.30am and so MN and CB did not finish work on time. She also reports that they criticised

for their cleaning standards on 30 January and suggests that the problem between CB and the Appellant had been 'going on for months' [54].

f. CO states 'having been the victims of false accusation in the same company last year because 'some groups of staff don't like you telling them to do the right thing' [95]; and that CB and MN were told by the Appellant that their standard of cleaning needed to improve and crucially that on 3.2. the Appellant was going to conduct supervision of the two [84].

g. The evidence shows that in his own supervision the Appellant had raised issues with staff conduct. This verifies the Appellant's account of events [250].

43. Ms Price submitted that there were potent and significant reasons for the staff witnesses not to be credible or tell the truth when giving their accounts. Yet this stands in stark contrast to the findings made by the DBS that there was no reason to question their veracity. The DBS have given no reasons for not considering the above list of concerns. This was a plain mistake of fact.

Failed to take into account evidence that supported the Appellant's account

44. Ms Price argued that CO's testimonial on behalf of the Appellant supports the Appellant's account that CB and MN were disgruntled that they were being told their work was not of the required standard and they were going to be put under performance managed or supervision because of it. Yet, the DBS appear to have entirely disregarded this evidence. The DBS found that 'there is no specific information within the body of the testimonials which indicates references are aware of the specific allegations faced by the Appellant [167].

45. She contended that this stands in again stark contrast to the testimonial provided by CO 'I am fully aware of the case' and 'I have never seen (the Appellant) kicking service users beds or waking them up unnecessarily or taking their personal belongings or using a lighter'. This comment neatly summarises the substance of the allegations the Appellant faces.

46. In light of this, the fact the DBS in their own words afforded 'little weight' to the testimonials is even more concerning [167] making it a clear material error of law.

47. Ms Price submitted that contrary to the submission made on behalf of the DBS, the totality of the inculpatory evidence was entirely deficient and was woefully insufficient in terms of permitting a rational conclusion by DBS, that on the balance of probabilities, the Appellant committed the acts of misconduct alleged.

<u>Ground 2: Mistake of law - irrational finding of fact (perverse finding)</u>

48. For the same reasons, Ms Price argued that the conclusion of the DBS that there was no reason to question the veracity of the staff members who spoke against the Appellant or to question their accounts was perverse. She relied on the above submissions in relation to mistake of fact.

Ground 3: Mistake of fact - procedural irregularity

49. Ms Price submitted that the DBS did not properly or adequately consider the inadequacy of the investigation the employer had conducted. There were significant gaps in the employer's investigation. No explanation was given for this. This was not taken into account by the DBS. The concerns with the employer's investigations included:

    a. The Appellant was not interviewed. The Appellant has now provided a witness statement and gave oral evidence. This evidence shows that there was clear reason to doubt the credibility of the individuals making the accusations. It also casts a serious doubt on the investigation carried out by his former employer, on which the DBS relied.

    b. The care records of the service users concerned were not examined or provided to the DBS. This would have demonstrated SS's behaviour, the expected management of these behaviours and also the reports of Dr Morris, who monitored and assessed SS progress. The Appellant has attempted to obtain these by way of a subject access request, however this has been denied. Therefore, this element of procedural unfairness cannot be rectified at this stage.

    c. No specifics were sought of the timing of the allegations. The Appellant has attempted to obtain the investigation documents by way of a subject access request, however this has been denied. Therefore, this element of procedural unfairness cannot be rectified at this stage.

    d. There is no mention of when the staff interviewed were in the service (this was highly relevant given at least three of them were not working at the service at the material time and had not worked there for some time).

    e. There is no discussion of why only some of the staff were interviewed, including staff who had left the service, rather than the current cohort of staff working on the site.

    f. Exculpatory evidence was not considered. For example, there was no reference to a staff questionnaire that was conducted prior to the allegations where no complaints were made about the Appellant.

    g. The fact that the staff appraisals showed the Appellant was an excellent employee. Again, the Appellant has attempted to obtain the investigation documents by way of a subject access request, however this has been denied. Therefore, this element of procedural unfairness cannot be rectified at this stage.
    h. The fact that the Appellant did not have significant amount of daily responsibility for SS and indeed his 1:1 care workers would have been best placed to comment on his behaviour and treatment. Yet these people were not even identified by the investigation.

50. Ms Price submitted that the Respondent failed to properly investigate matters themselves. Had the DBS investigated further and sought the underlying

documentation from the Home who reported this matter, it would have seen that there was no further explanation that justified the limited approach to the investigation. There were no witnesses were called to the disciplinary hearing. No record was made of an alleged conversation with the resident, who undertook this conversation or what he was asked (for example leading or non-leading questions), and nor how his capacity for this interview was assessed.

51. She argued that the DBS would also have heard from the Appellant that there were other reasons not to accept the staff accounts at face value. Such as animosity towards the Appellant due to the fact he wanted higher standards of cleaning in the service and this had caused resentment amongst staff. And had the DBS investigated matters, they would also have found that that some of the staff and management were related and this hampered management and caused animosity amongst staff members.

52. The DBS would have seen from the Appellant's appraisal and supervision records there were no other issues recorded with his conduct and he was considered as an employee who did well [251], [253], [254], [256] the latter of which records he is 'performing to excellent standards' and [258], [260], [261].

53. Ms Price contended that in terms of the police investigation, the DBS would have seen that the police took no further action. Also it would have seen that the Appellant was consistent in interview in his denials and in respect of his response to the DBS. The DBS would also have noted that the police did not interview anyone else involved.

Ground 4: Mistake of Law – irrationality and proportionality

54. Ms Price submitted that the listing of an individual is plainly a matter that engages article 8 of the European Convention on Human Rights. The Appellant (a) lost his right to work in his chosen profession, that he has gained skills and experience within. It restricts his life choices, his professional relationships and has a negative financial impact on him. Therefore, a very careful balance must be struck between the very serious intrusion on the Appellant's rights under article 8 and any public interest.

55. She accepted that although it is recognised that there is a substantial public interest in safeguarding adults and/or the importance of maintaining public confidence, the DBS did not, or did not adequately, consider article 8 when assessing the possible risk the Appellant posed.

56. She argued that in light of the paucity of the evidence suggesting the Appellant had acted as alleged and the Appellant's credible denials of the same, it was both irrational and disproportionate for the DBS to decide in was both reasonably necessary and appropriate to bar, in the circumstances, in pursuance of their legitimate aims. Nor in terms of the factual findings the DBS did make, did it adequately consider the training the Appellant had undertaken, the work experience he had built up, his good character and the fact that this was an isolated allegation in an otherwise unblemished career.

Conclusion

57. For all of the above reasons Ms Price contended there were both material errors of fact and law in the DBS decision and this appeal should be allowed. Given the paucity of evidence concerning the issue of whether the Appellant undertook any relevant conduct, the DBS should be directed to remove the Appellant's name from the adult's barring list.

Discussion and Decision

58. 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 his appeal (which was not available to the DBS at the time it made its Decision) and make findings of fact as set out below.

59. The evidence that was before the DBS when it made its Decision did include 20 pages of factual and legal submissions dated 17 July 2020 on behalf of the Appellant – the factual representations made, denying the allegations, were in very similar terms to his witness statement dated December 2022. These were considered but rejected by the DBS in its Rationale Document dated 18 August 2020 with its reasoning explained therein.

60. 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 establishing the facts and making its findings of relevant conduct in its barring decision. Thereafter on the appeal to the UT, 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.'

61. 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.'

62. We note that the Appellant attended the hearing of the appeal, gave evidence and was cross examined. This is in contrast to the DBS's witnesses who did not. Their evidence was written and untested, some of it consisted of handwritten statements and some of notes of answers given to question in interview.

63. While potentially less weight is to be given to the written evidence of those DBS witnesses, and their reliability and credibility has been impugned by the Appellant, we have had to balance this against our assessment of the Appellant's reliability and credibility, having heard him give oral evidence.

64. We are not satisfied that the Appellant was a reliable and credible witnesses. First, he made an admission in oral evidence that we find was damaging to his case – he conceded that he 'couldn't stand SS when triggered'. This oral evidence stands in contrast to his factual representations of 17 July 2020 which state: 'Accusation 3, [IE] denies this allegation. [IE[has no issues with [SS] with regards to his behaviour, so had no reason to take his belongings to procure good behaviour'. This is a noteworthy inconsistency. It also explains a motive for the Appellant's unprofessional, controlling and harmful behaviours – the Appellant wished to minimise the opportunity for SS to behave in a way that aggravated the Appellant, so he adopted inappropriate methods of control over SS.

65. This is one of the reasons we have found there were no material mistakes of facts in the findings for most of the allegations against the Appellant in relation to SS.

66. Second, the Appellant's evidence was inconsistent with a number of witnesses who gave evidence against him. In total there were seven witnesses - all former colleagues, five whom he claimed did not like him for various reasons but a further two whom he worked most closely with and whom the Appellant states would have no motive to impugn him, namely RP and CO. While the written evidence of these two witnesses was largely supportive of the Appellant, they also gave written evidence that was damaging to and inconsistent with the Appellant's case in some important respects. Therefore, even those witnesses whom he relied on as giving supportive evidence on his own behalf – RP and CO – did not give fully supportive evidence but evidence that tended to support some of the allegations.

67. Finally, we found that the Appellant's answers in cross examination tended towards a bare denial and demonstrated a lack of insight or an inability to make any reasonable concessions – he maintained his behaviour was exemplary at all time as set out in his witness statement. He made no room for conceding that the DBS witnesses could be mistaken in their perception or memory. In particular, we do not accept his suggestion that all of these witnesses were maliciously motivated to give false evidence against him by virtue of either a racial divide in staff or resentment towards his management actions - we found it in inherently unlikely that such a large number of witnesses would fabricate evidence with such consistent and corroboratory content. There was a common theme in all the witnesses' evidence of the Appellant being someone who was prepared to

resort to harmful actions to control or coerce residents to obey him, in particular, SS.

Ground 1 - Material Mistake of Fact

68. On balance we have decided that there were material mistakes of fact in relation to three of the nine allegations but the remaining six, the most serious allegations relied on by the DBS, did not contain mistakes of fact and were established on the balance of probabilities.

69. In relation to these six allegations where there was no mistake of law nor fact, we are satisfied:

(a) The totality of the incriminatory evidence from the seven witnesses relied on by the DBS was sufficient to permit a rational conclusion by DBS, on the balance of probabilities, that IE committed six of the nine acts of misconduct set out in the Allegations.

(b) Having regard to that evidence (particularly that set out in the statements and the fresh evidence now presented which was not originally before the DBS), and the way in which DBS considered and weighed the evidence, we are not satisfied that the DBS made any material mistake of fact in relation to these allegations.

70. The location of the key documentary evidence (i.e. from within the statements), relied on by DBS (as clarified by any analysis of the Rationale Document), and which supports its key findings of fact regarding each sub-allegation, is set out below.

71. We now turn to address the nine allegations but do not address them all in numerical order.

Allegation 1: woke service users unnecessarily and using inappropriate methods (pulling off covers, turning lights on/off, kicking beds, shouting names)

72. DBS relied on the following six witnesses in relation to this allegation, with the relevant extracts from their evidence quoted below.

(a) SB [59]:

‘Q. Can you tell me about handover?
A. [the Appellant] takes us around the bedrooms. He didn't used to, but he started doing it about a year ago.
Q. Does he pull covers off the residents and wake them up at .7am?
Q. Yes he does. He wakes them at 10pm too. It depends what shift he's just finished or is just starting.
Q. Does he kick AJP's bed to wake him up?
A. Yes he does. And he pulls the covers off him top’

(b) CT [62]:

‘Q. Can you tell me about morning handover? Does a walkabout happen?

A. Yes, but only with [the Appellant]. He never used to let me go home on time and my dad was always waiting outside for 20 minutes.
Q. Does he wake anyone?
A. Yes, and he shakes or hits the bed to wake them up.
Q. Who In particular?
A. AJP.
Q. Are the covers removed?
A. Yes, [the Appellant] pulls the covers off them to wake them up.'

(c) CB [45A]:
'In my opinion all clients wellbeing have been jeopardised – for example a walk around in the morning and night to wake all clients up by shorting their names. The turning on and off of the light switches, pulling off their bed quilts and kicking and tapping of the end of the beds.'

(d) MN [49]:
'During handover if I was coming on a night shift [the Appellant] would take us around all of the client's bedrooms (excluding U's) where he would turn on their light and call their name until they responded, for J he would kick the end of his bed until he woke up.

He would also do this when coming on a morning shift after my night shifts. He would turn their light on and open their curtains and then ask how they were during the night while still in their room, sometimes taking 5-10 minutes in their bedrooms. When entering M's bedroom during this morning he would tell him he has to wake up for a shower as a joke, causing M to get angry and shout'.

(e) RP [52]:
'Q. What happens when you all enter AJP's room for instance?
A. We go in and [the Appellant] wakes AJP up by tapping on the shoulder.
Q. And the other residents?
A. [the Appellant] takes the duvet off to check they are ok. He does the bed checks on GB's bed as they need to be done every week. MS is woken up and asked if he's ok. [the Appellant] tells him he will come back in a while.
Q. Would you like me to come into your bedroom with 3 other people, stand over your bed, remove your duvet from your body, wake you up and then talk about you?
A. no reply.
Q. So why do you think its ok to do with our residents? Do you see how bad this?
A. No reply'.

(f) AA [56]:
Q. Can you tell me what happens during a handover from late shift to night shift?
A. [the Appellant] takes everyone around the bedrooms. Most of the residents are in bed asleep by 10pm but he goes in and we all have to follow. He stands there and just talks about what happened that day with each resident then we leave the room. With UP he shouts her through the door.'

(f) CO [55]:
'Q. Tell me what happens on a handover from night to morning shifts?
A. We all go around the bedrooms and check everyone is breathing…With AJP [the Appellant] taps him to check he is alive.
Q. Why would he not be alive?
A. I don't know. But sometimes he looks dead when he's asleep. GB is woken up and his bed is checked for wet. [the Appellant] is the most thorough and checks everything. MS is

woken up by us walking into his room, and he's told his breakfast is getting cold as he needs to get up early.
Q. Why does he need to get up early? At 7am?
A. Because he has activities.
Q. That doesn't matter. If he wants to stay in bed and have a rest day then that's his choice isn't It,
And activities can be rearranged can't they?
A. Yes.
Does Z do a walkaround during handover?
A. No only [the Appellant] does this.
Q. Would you like me to come into your bedroom, with 3 other people, stand over your bed, remove
your duvet from your body and exposing you, wake you up and then talk about you?
A. No
Q. So why do you think its ok to do this with our residents? Do you see how bad this Is?
A. Yes.'

Allegation 3: removed personal belongings to punish or procure good behaviour

73. DBS relies on the following six witnesses in relation to this allegation:

(a) CB [45]:
'[the Appellant] used to use the removal of clients' personal belongings as control and punishment'. For example, the removal of a Christmas hat that would be given back to SS at the end if the Appellant's shift if he had behaved himself.

(b) MN [48]:
'Also during some handovers [the Appellant] would take us into SS's room and if he was still awake he would take something from SS's room like his Christmas hat or the scart lead to his TV or a DVD and tell him he would only give it back to him if he stays in bed all night doesn't go downstairs and disturb staff. SS would always agree to not go downstairs and would always seemed worried. Whenever the Appellant left the house I would always return the item to SS's room and he would always seem happy again. I didn't agree with taking SS's possessions which is why I always made sure he got them back and being new to care work I didn't realise just how bad this actually was.

(c) RP [60]:
'Q. Anything that you have seen or done that is wrong.
A. Ok, I've seen [the Appellant] take SS hat.'

This evidence is particularly striking in light of RP's initial denial [51]:

'Q. Have you seen anyone take away any of his belongings? Hat?
A. No'.

(d) HI [57]:
'Q. Have you seen anyone take SS belongings?
A. Yes. [the Appellant] taught me to take his stuff to make him behave, and he taught me to be firm with SS. It never felt right so [the Appellant] would call me soft and tell me off for not doing what he said.'

(e) SB [59]:
'Q. Have you seen any belongings being taken away as a punishment?

A. Yes. [the Appellant] always took SS Santa hat.

(g) CT [61]:
Q. Have you seen any of SS belongings being taken away from him?
A. Yes, [the Appellant] would take things for weeks on end, like he forgot to return them. He latest thing was the birthday card you got SS, but it used to be the Christmas hat.

(h) CO [54]:
Q. Have you seen his belongings taken away from him?
A. Yes. His Santa hat. SS makes MS angry so his hat is taken away.

74. In respect of each of these two allegations, six witnesses give strikingly similar and consistent evidence against the Appellant. The witnesses include RP and CO, the two witnesses that the Appellant accepts did not have any motive to make up malicious allegations against him and who were 'on his side' and worked closely with him. The allegations do not simply concern the treatment of SS but of multiple residents.

75. We do not accept the Appellant's evidence that all this evidence was unreliable or that there was a conspiracy or motive to give false evidence on the part of the DBS witnesses (his former colleagues).

76. The starting point is the DBS's findings of fact which were made without the benefit of the Appellant's witness statement and oral evidence but after considering and rejecting the factual representations made on his behalf which were similar to his evidence. We are satisfied that the DBS's findings and reasons therefor have not been disturbed by the Appellant's further evidence.

77. We are satisfied on the balance of probabilities that there was no mistake of fact in the DBS's findings and that these allegations are proved on the balance of probabilities. We are also satisfied that this conduct constitutes relevant conduct because it caused or was likely to cause emotional or psychological harm to vulnerable adult residents.

Allegation 2: the Appellant made SS stand or sit in silence for prolonged periods

78. DBS relied on the following four witnesses in respect of this allegation:

(a) AA [56]:
'Q. Does anyone teil SS to remain silent?
A. Yes. [the Appellant] told SS at the dinner table to stay silent for one hour and he can have extra for supper. I didn't see if SS got the extra food but he was being quiet. He did this a few times but I can't remember.

(b) HI [57]:
Q. Have you seen SS being instructed to be silent or go to his room or anywhere else?
A. Yes. Whenever I was SS one-to-one [the Appellant] would always take over. SS liked me and was happy around me but if he was too loud then [the Appellant] would take him to the hallway at the bottom of the stairs and shut them in together. I didn't know what was happening apart from I could hear [the Appellant] telling SS to remain silent. [the Appellant] would also make SS sit in the lounge for periods of time and be silent. He had body

language and eye contact that scared SS. [the Appellant] would always send SS to his room too. Plenty of times.

(c) CT [61]:
'Q. Does anyone make SS stand or sit in silence?
A. Yes. [the Appellant] takes it to the extreme. He tries to trigger SS because he makes SS sit down on the far sofa and be silent for half an hour, but when the time is nearly up, [the Appellant] does something to make SS fail. Then he has to sit back down again.

(d) CB [45]:
'myself and SS were made to stand in the kitchen net to each other for half hour while the Appellant stood in front of us and RP was standing by the sink. SS was told on several occasions to "keep your moth shut and don't move."

Allegation 4: the Appellant used or threatened to use, or discussed cigarette lighters, knowing SS was scared of them, in order to procure good behaviour

71. DBS relied on the following five witnesses with regard to this particularly serious allegation:

(a) CB [45]:
'I heard voices in SS's room so I went to see if SS was okay. As I entered the room SS was lying diagonally on his bed, I was unsure whether he had been pushed or lay down in fear. RP was standing over SS flicking a light that was alight about 2 inches away from SS's shoulder. I ran towards SS and put my hand in front of the lighter so SS would not be injured. I question RP who had told him to control SS in this way and received no reply. I told RP to remove himself from the situation and calmed SSS down, as he was very afraid and shaking. I report this to the Appellant as he said he would sort this situation out. Unbeknownst to me at the time, it was the Appellant's instructions telling him to control SS in this manner.

[the Appellant was on the bottom of the stairs and I was standing in the doorway to the lounge. I became aware of a clicking sound and SS shouting very distress. I went to what was happening and saw [the Appellant] flicking something in his pocket which he proceeded to remove and light the lighter towards SS. At this point SS was very scared and upset and ran to his bedroom. When the Appellant removed himself from the situation I went and checked SS.'

[46] 'Members of staff were told to go and buy lighters if they did not have them and use them against SS to control him'

(c) MN [48]:
'When coming onto my night shifts on several occasions during handover, [the Appellant] would go into SS's bedroom and if he was asleep, he would call SS's name and if he didn't respond, the Appellant would ask another member of staff for a light until SS responded to check if he was actually asleep. I never passed my lighter to him nor did I witness any other member of staff pass him one of theirs due to the wellbeing of SS. On the times SS did wake up he seemed confused and scared. It made me feel uncomfortable and wasn't sure why he was asking me for a lighter. Once [the Appellant] left I went back to SS's room to check on him every time. (I only recently learnt of SS's traumatic past involving lighters form another member of staff. Otherwise I would have reported it sooner).'

(c) CT [61]:
Q. Have you ever seen or heard of anyone using lighters around SS?
A. Yes I've heard from staff that RP had bought a lighter because [the Appellant] told him he can use it to discipline SS.
Q. What about [the Appellant]?
A. [the Appellant] is sneaky. He takes SS to the hallway and shuts himself there with him. You can hear him spark the lighter and then they come out and SS is good.

(d) SB [59]:
Q. Have you seen anyone use a lighter or talk about lighters to SS?
A. [the Appellant] would often use the word 'lighter' in a sentence in front of SS which would upset him. [the Appellant] would tell SS he had a lighter but I never saw him with one.

(d) HI [57]:
'Q. Have you witnessed any staff threaten to use a lighter on SS?
A. Not a threat but I've heard the lighter thing being said before by [the Appellant]. Staff try and calm SS if he gets upset about lighters, but [the Appellant] doesn't calm him. He makes it worse by talking about lighters.'

Allegation 7: the Appellant made SS stay inside his room (numerous occasions)

79. DBS relied on the following four witnesses in respect of this allegation:

(a) CT [61]:
'Q. Does anyone send SS to bed or to his bedroom as a punishment?
A. Yes, [the Appellant] always sent him to his room. Day or night, but when it was in the day then SS wouldn't come back down. He would go to sleep and then be up all night with the night staff.

(b) HI [57]:
'Q. Has SS been sent to bed or to his room?
A. Yes. [the Appellant] did that a lot.'

(c) SB [59]
'Q. Have you seen anyone physically handle any resident?
A. [the Appellant] would push SS up the stairs to his room then shut the door. If SS carried down, he would push him back up again'.

(d) MN [49]
'If SS didn't follow these instructions, [the Appellant] would send him to his bedroom. When I witnessed these exchanges, I would usually engage SS in conversation and take him out of the situation as I could see how uncomfortable and panicked SS was.

Allegation 9: the Appellant removed or delayed food from SS, to procure good behaviour

80. The DBS relies on the following three witnesses in respect of this allegation:

(a) CB [45]:
'There was food on the side in the kitchen that SS requested to have several times. The third time he asked myself and SS were made to sand in the kitchen next to each other for half hour while the Appellant stood in front of us and RP was standing by the sink….I tried to

remove SS on numerous occasions but was unable to do so because [the Appellant] was standing in front of us. After the half an hour he was told that he could not have the food was sent to his room. I made an excuse I needed a break and went straight to SS's room to calm him down as the well being of the client had been seriously invaded.'

(b) AA [56]:
'Q. Does anyone tell SS to remain silent?
A. Yes. [the Appellant] told SS at the dinner table to stay silent for one hour and he can have extra for supper. I didn't see if SS got the extra food but he was being quiet. He did this a few times but I cant remember. And if SS is talking while eating, [the Appellant] takes his food away from him and tells him to go in the lounge; Then he eats on his own at the table when the others have finished.

(c) RP [51]:
'Q. Has anyone ever taken away his food?
A. If he's not being good then we take away his food. We tell him he's not going to get his breakfast but we still give it to him, it's just delayed.'

81. We are satisfied on the balance of probabilities that allegations two, four, seven, and nine contain no material mistake of fact for the same as we have set out above in relation to the Appellant's evidence generally and or similar reasons in relation to allegations one and three (although there is only supporting evidence from CO or RP in relation to allegation nine). There are a number of witnesses who give similar and corroborating evidence and fits a pattern of controlling, coercive and harmful behaviour towards SS.

82. Allegation 4 is a particular serious finding because it involves the Appellant exploiting SS's traumatic past to use a harmful psychological technique to cause him fear.

83. In its Rationale document the DBS considered the Appellant's representations made denying the allegations but gave rational reasons for rejecting the denials. We agree with the reasoning therein.

<u>Allegations which contain mistakes of fact</u>

Allegation 5: used inappropriate force on SS: (a) pushing him up the stairs to his room; (b) unauthorised restraints by holding his arms down

84. DBS relied on the following two witnesses in respect of this allegation:

(a) SB [59]:
'Q. Have you seen anyone physically handle any resident?
A. [the Appellant would push SS up the stairs to his room then shut the door. If SS carried on, he would push him back up again. The Appellant used to.be nice to SS. Used to give him treats but something changed.
Q. Have you seen any other staff do anything that I need to know about?
A. RP pushes SS up the stairs too. He learnt from [the Appellant] as they always work together.
If SS asks staff "a question, [the Appellant] always answers for the staff and doesn't give them a chance'.

(b) HI [57]:
'Q. Tell me about [the Appellant] and SS?
A. He takes physical restraint seriously. He comes across as professional but there's a few things I didn't like. I haven't worked there for a while but I was taught by [the Appellant], and I didn't like it. He would make SS repeat instructions. But the whole sentence had to be right and if SS made a mistake he would make him start again. It took ages sometimes.
Q. What do you mean by physical restraint?
A. Like when he would show us how told hold SS arms down.
Q. That's Illegal, No one is permitted to be restrained.
A. Yes I know that now, I learnt that after I left 39 last year.

Allegation 6: threatened to call the police on SS

85. DBS relied on the following three witnesses in respect of this allegation:

(a) CT [62]:
'Q. Have you heard anyone threaten to call the police on SS or anyone else?
A. Yes, [the Appellant] did it to SS a lot.'

(b) HI [57]:
'Q. Have you heard anyone threaten to call the police if SS wasn't good?
A. Yes. [the Appellant].

(c) SB [59]:
'Q. Has anyone told SS that the police were going to be called on him?
A. [the Appellant] does.'

Allegation 8: instructed SS to say good morning to each staff member and to speak properly and stand up straight when doing so

86. DBS relies on only one witness in respect of this allegation:

MN [48]
'During morning handovers if SS was in the lounge when the Appellant arrived he would tell SS to say good morning to each member of staff individually and if he spoke quietly the Appellant would tell him to 'Speak properly' and would tell him to constantly 'stand up straight' or to look at him when speaking. I found these situations really uncomfortable and felt [the appellant] was being really patronising, like he was speaking to a child.

Analysis

87. In relation to the three allegations: five, six, and eight, we are satisfied that there were mistakes of fact in the DBS finding each of them proved on the balance of probabilities.

88. There were fewer witnesses in support of each allegation (three, two or one witness) and while corroboration is not necessary and it is not an arithmetical exercise of counting witnesses, it allows for a greater room for potential unreliability in their evidence.

89. The Appellant has denied each of these allegations in the specific terms set out in his witness statement above (which mirror his original representations). While we have not found his evidence to be reliable in general and in respect of the six allegations above, we accept that not all of his evidence was unreliable.

90. In respect of these three allegations, we are satisfied that the witnesses are mistaken and have misinterpreted actions of the Appellant as constituting harmful behaviour (without any finding they were lying).

91. In relation to allegation five, we accept that physically this is unlikely to have been possible for the Appellant given the difference in physical size he describes in his statement.

92. In relation to allegation six, we take into account the fact that the evidence given by the DBS witnesses is in brief and undetailed answers and is largely given in relation to leading questions from the interviewer.

93. In relation to allegation eight, we accept that the witness may have misinterpreted these statements and the Appellant's behaviour as being harmful when it was not part of deliberate or coercive conduct on the Appellant such that it did not amount to relevant conduct.

Relevant Conduct

94. We have found there to be no mistake of fact in six of the nine allegations and findings relied on by the DBS as relevant conduct. There was no argument that the allegations and findings, particularly when viewed collectively and as part of a proven pattern of conduct, did not amount to "relevant conduct" under the Act. They obviously did. The Appellant's actions caused harm or a risk of harm (emotional, psychological or physical) to SS and other residents. The witnesses testified to as much and their evidence has been found to be reliable in this respect.

95. As the core allegations have been found proven, it was and is, unarguably, "conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult" and/or "conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him".

Materiality

96. Although, we have found that there were mistakes of fact in relation to three of the nine allegations, given the number and seriousness of the six allegations that were proved not to contain any mistake, it is inevitable that the DBS would have made the same decision to bar the Appellant from working with vulnerable adults. The mistaken facts were not material to the ultimate decision – it is inevitable that the DBS would have decided it appropriate and proportionate to bar the Appellant based on the six established allegations of relevant conduct.

97. The issue of whether it was "appropriate", in such circumstances, to place IE on the List is beyond the jurisdiction of the UT, unless the same was either irrational or disproportionate. We are satisfied that the Appellant has not established that barring was either irrational nor disproportionate for the reasons we set out below.

Other conduct relied upon by the DBS

98. More widely, DBS relies on the following further misconduct against the Appellant which did not form part of its allegations of relevant conduct: (a) SS being "scared of [the Appellant]": AA [56]; HI [57]; SB [59]. (b) SS being made to repeat instructions: HI [57]. (c) Intimidating/manipulating/coaching/limiting staff: SB [59]; HI [57]; CT [61-62].

99. There is no need for us to make any findings on these matters.

Other mistake of fact arguments raised by the Appellant

100. We consider below the other arguments raised by Ms Price in relation to mistake of fact.

101. We are not satisfied that the DBS failed to consider the weight of the evidence that undermined or put in question the credibility of the witnesses that made the allegations. We are satisfied that the DBS considered these matters, in so far as they were before them, but rejected them when making its findings.

102. The DBS is required to exercise its own independent judgement and to make necessary findings of fact, on the civil standard of proof. It considered the Appellant's representations dated 17 July 2020 but rejected them for reasons it gave in its Rationale document and its Decision. The representations included matters said to undermine the credibility of the DBS witnesses.

103. It is those documents, the Decision and the Rationale document, which together set out the overall substantive decision and the detailed reasons for it (see, for example, *AB v DBS* [2016] UKUT 386 (AAC), para 35, in support of that proposition which is not considered to be controversial).

104. In the Rationale Document, it is apparent that the evaluation relating to each specific sub-allegation was carefully evaluated by the DBS decision-maker. Specific references are made to the statements relied on by the DBS.

105. In the case of each of the six allegations we have found to contain no mistake of fact, the DBS was able to identify and rely on inculpatory evidence from multiple sources. On the face of it, that evidence was (and remains) reliable, credible and persuasive. Set against that, the DBS had to consider the

Representations. As can be seen from the Rationale Document, DBS carried out that task with reasonable care.

106. In the final analysis: in relation to each of the Allegations proved, there was a strong body of credible evidence pointing clearly towards IE having committed the relevant conduct. Ultimately, the Appellant's Representations, like the evidence he gave, were not persuasive. The reasonable action in the circumstances was for DBS to **prefer** the evidence from the Appellant's former colleagues.

107. Moreover, this was not, in reality, a situation where the Appellant's former colleagues were likely to have been mistaken about the central matters which have been proved: either they were telling the truth and were correct about the core allegations or they were (all) lying and acting in an active conspiracy against IE. There was no credible reason why so many individuals would lie and conspire, in such a serious way, against IE. It was – and it is – more likely than not that the core allegations are simply correct, as found by DBS and by us.

108. In any event, given our factual findings, any mistakes by the DBS have been cured by us having considered all the evidence afresh – both that before the DBS and that which has been served subsequently.

109. We, like the DBS, have considered the evidence and arguments put forward by the Appellant when making findings of fact. When the DBS stated for example that there was 'no reason to doubt the veracity of the records of the discussions or contents of the statements' (made by the former colleagues), it might properly have said that there was 'insufficient' reason to doubt their credibility. However, this point is not material.

110. We, like the DBS, have considered the alternative case put forward by the Appellant – that his former colleagues were motivated by a racial dislike, personal dislike or falling out with his managerial style and decision-making regarding their performance review.

111. We have rejected it, like the DBS on the basis that, whatever their personal feelings for the Appellant, it highly unlikely that each of the many witnesses would share similar motives to impugn the Appellant's credibility by making factual allegations which were so consistent and corroboratory without a high degree of collusion or conspiracy. Furthermore, the allegations were partially supported by the two witnesses, RP and CO, that the Appellant wished to rely upon as supportive. These were two witnesses who the Appellant says spent the most time working with him.

112. The fact that there was no evidence sought or before DBS in the form of contemporaneous records from the Home, is not surprising in all the circumstances as they are properly understood from the material presented before DBS. This was a situation where one "whistleblower" first notified the employer of the acts of IE, and then other members of staff – operating in more junior positions to IE – followed. The absence of any such records may, in that

way, be reasonably expected, and would not and does not undermine the Decision.

113. The fact that there was no evidence sought or before DBS from residents, other staff medical doctors, or other specialists, does not undermine the Decision, in any material way, either. Nor does the claim from IE that nothing had been mentioned, earlier on, in something like a staff survey.

114. The fact that there may have been further evidence which was not obtained does not detract from the evidence that was obtained and relied upon. Neither the DBS nor the Home were under a duty to conduct further investigations and obtain further evidence in this case for the reasons we explain below in relation to the error of law ground. Although it may have been impractical or difficult for the Appellant himself to obtain missing evidence from these absent sources, he could have attempted to collate evidence from supportive witnesses of fact on the substantive issues as he did from CO.

115. Furthermore, we are not satisfied that the DBS failed to properly take into account the evidence that supported the Appellant's denials. The Character References and testimonials the Appellant provided in support of his good character were considered but reasonably deemed not sufficient to point to a different decision. Ultimately, they do not outweigh the directly relevant evidence set out in the DBS statements. To the extent that CO provided separate supportive testimonial on behalf of the Appellant, she had already provided evidence to the DBS that was also partly inculpatory.

116. It is clear that DBS took into account and gave consideration to the Character References provided, along with the Representations, by IE. In the Rationale Document, the decision-maker allowed them "little" but therefore some weight. It was rational and reasonable to only give the Character References some limited weight in all the circumstances. It is correct to say that, in broad terms, these were classic "character references" or "testimonials":

117. The first [82] stated that the referee had known IE for a couple of years and had worked under his supervision for about six months. It contained a relatively bare and generic assertion/opinion that IE "has a very strong work ethic", takes his duty of care "seriously", addresses "everyone" he "comes in contact" with "in a polite and civil manner", and, in his or her experience, made decisions in the best interests of clients. It made no reference to any DBS proceedings against IE or to the allegations, whether specifically or generally.

118. The second [83], provided by a "friend", stated that he or she had known IE for around eight years, including as a work colleague, university peer and member of a religious group. The referee claimed to be able to "attest" that IE "possesses caring and compassion [sic] personalities, enthusiastic [sic] and dedicated towards every assigned task". There is a reference to the referee being aware of IE's "potential inclusion on the barred list". There is an assertion that that "appears to me a defamation of character and should be heavily investigated". There is a statement: "Without reasonable doubt, I believe that the

allegations that have been levelled against [IE] of false". However, there is: (a) no suggestion that the referee knew the precise particulars of the Allegations; and (b) no particular evidence or information relating to them specifically.

119. The third [84-85] reference is longer. The referee, it will be noted, was already one of the individuals who provided the Statements [47-48]. In his subsequent reference, she/he states that they had resigned claiming to have felt that there was a conspiracy against him/her. The referee states that he/she had known IE for about 8 months, that he/she worked under his supervision at the Home and refers to IE's hard work ethic and general competence. This referee states that he/she is aware of the case and that "the allegation" did not reflect the true character of IE. Unlike the other two, this referee does refer to some of the specific allegations: saying that he/she has not personally witnessed IE "kicking service users' bed [sic]" or "waking them up unnecessarily" or "taking their personal belongings" or "using a lighter".

120. Overall, there is nothing sufficient within the Character References, whether taken individually or together, to undermine the Decision and render it mistaken in fact or law. It is reasonably clear that DBS was aware that the third referee (only) was in fact aware of at least some of the allegations. It is reasonably clear that the DBS rationally and reasonably inferred that the other two were not aware of them and/or did not address them in any direct or meaningful way. But, even if DBS was wrong as a fact about that the referees' knowledge of the allegations, it would not have made a material different to the outcome, as the weight of evidence was and remains in favour of the conclusion that IE did the core acts as found proved.

Ground 2 - mistake of law – irrational findings as to fact (perverse findings)

121. For all the same reasons as set out above, we do not accept the submission that there were any perverse findings by DBS such as to amount to an error of law. Ms Price argued that the conclusion of the DBS that there was no reason to question the veracity of the staff members who spoke against the Appellant or to question their accounts was perverse. As above, we accept it may have been incorrect because it should have said there was insufficient reason to question the veracity, but in light of the material already put before the DBS in the representations but it was not perverse to reject this material. The DBS was entitled to prefer the account provided by these witnesses and reject the suggestion the reasons relied upon by the Appellant that they were lying.

122. In any event, any errors of law in the DBS's findings of fact are not material given that we have considered all the evidence afresh and found no mistakes of fact in six of the allegations. We have considered the same matters and come to the same conclusion.

123. The factual findings of the DBS, even the three which contained mistakes of fact, were all findings it was reasonably entitled to come to on the evidence before it. There was no perversity nor error of law.

Ground 3- Procedural Irregularity

124. Ms Price submits that the DBS did not properly or adequately consider the inadequacy of the investigation the employer had conducted. There were significant gaps in the employer's investigation. No explanation was given for this and this was not taken into account by the DBS.

125. We reject this submission.

126. First, it is clear that DBS was aware that the employer's investigation (and the wider disciplinary procedure of which the investigation would be a key part) was incomplete. It the summary to the Rationale Document [133], for example, the following is stated:

Between 3 February and 5 February 2020 [the investigator] interviewed numerous staff members in relation to [IE's] alleged behaviour, however there is no record of any discussions or interviews that have taken place with [IE] himself, which may be due to the fact that the police had been informed about the matter.

127. As such, DBS did not rely on any purported findings of fact or any conclusion by the employer and it recognised that IE had not had an opportunity to give his account and challenge the allegations within that internal process.

128. Second, while it might have been preferable, it is ultimately not material, whether any internal workplace proceedings had been completed or not (or even whether they were fair or not). Ultimately, DBS was still required to make a decision on the available evidence and that is what it did in this particular case.

129. It would be a rare case where it would be procedurally unfair or improper for the DBS to make a barring decision based on sufficient available evidence but where an internal, employer's or police investigation was incomplete or outstanding.

130. The absence of further evidence is a matter that may be taken into account by the DBS but ultimately the Appellant can attempt to serve and rely upon evidence that was previously unavailable – both in representations to the DBS before the barring decision and in any appeal to the Upper Tribunal.

131. As a matter of completeness: the evidence indicates that the key decision by the police and/or the CPS about whether to pursue formal criminal proceedings against IE was not made at the time of the Decision. That is what the letter from IE's solicitors to IE, dated 21.09.20 (i.e. after the Decision was made and sent out), indicates [128]. And, in the Representations, it was stated that, as of 17.07.20, IE's representatives "understand that the matter is still with the CPS for a charging decision". There is no suggestion that IE contacted DBS with any material update on this point before the Decision was made.

132. Further, in any event, it would not have made any difference to the outcome. Any decision by CPS would, of course, have been made in relation to the

completely different – and more demanding – standard of having to prove alleged matters beyond reasonable doubt. Bearing that in mind, DBS would, on the evidence before it, have made the same decision even if both: (a) CPS had made its decision before DBS made its decision; and (b) DBS been aware of that fact.

133. Moreover, the DBS cannot properly be criticised for pressing ahead with its decision rather than, as an alternative, awaiting some potential decision at some undefined point in time by the CPS. DBS has a statutory duty to take action, when it considers it appropriate and in line with the applicable legislation to do so, in order to protect vulnerable members of the public.

134. Further, the absence of interview of the Appellant by the home, the absence of evidence from other staff members and care records of service users are all cured by our findings in relation to the available evidence from the DBS and the Appellant. Ultimately, the Appellant may attempt to request further material from the DBS or his former employer and obtain witness summonses from the Tribunal (or other forms of legal remedies through the courts) to obtain further evidence if it is relevant and it is not supplied voluntarily. He has the opportunity to remedy the gaps in any investigation by the employer or the DBS. Neither the employer nor the DBS is under the duty nor obligation to conduct an investigation and obtain evidence equivalent to that in a criminal investigation and prosecution.

135. Therefore, we accept that there was no error of law in the DBS's failure to obtain other evidence or obtain disciplinary records or interview other residents or co-workers in this case (and where the Home had not done so).

136. There is no statutory or other duty upon the DBS (or employer) to pursue all reasonable lines of enquiry – only the public law duty for the DBS to act rationally and in good faith when obtaining evidence and relying upon it. However, in future cases it would assist if the DBS makes clear that it has used its best endeavours to pursue all reasonable lines of enquiry pointing towards and away from the case it alleges and takes 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.

137. In this case, we were given no evidence of the size of the care home or number of residents or co-workers. However, we can take into account the absence of evidence when deciding whether there is a mistake of fact by the DBS. We have done so but it has not altered our findings.

<u>Ground 4 – Proportionality</u>

138. We are satisfied that there is no substance to the final ground on proportionality – or any challenge to the Decision on rationality/perversity grounds. Once the decision had been made that most of the alleged relevant conduct has occurred, and that it amounts to "relevant conduct" and that it was appropriate to place IE on the List, it cannot be properly argued that the barring decision was "irrational". The Decision and Rationale provide reasonable and

sufficient reasons in relation to each statutory condition which is required to be satisfied.

139. Neither are we not satisfied that the Decision was "disproportionate". There was no evidence of insight or remorse from IE because he denied all the allegations. That was – and is – significant in a case such as this. There was sufficient evidence of intention and blameworthiness to commit the relevant conduct.

140. The conduct, once found proved, constituted an abuse of trust placed in IE as a care-giver to vulnerable adults and, moreover, as a supervisor of more junior staff. The (proven) allegation relating to the cigarette lighter alone was sufficient, without more, to justify a barring decision. We are satisfied that there was, here, agreeing the findings of fact arrived at by DBS, a clear pattern of relatively serious, culpable and highly inappropriate misconduct/ abuse of a type that would be very difficult (even had there been all necessary insight) to remediate effectively.

141. We are satisfied that DBS had an entirely legitimate and rational concern that, should IE be permitted to continue to work with vulnerable adults, he might repeat such conduct in the future. In any event, so long as rational, the assessment of risk is a matter for the expert assessment of the DBS and we take into account the issue of maintaining wider public confidence in the regulatory scheme, too. That is a matter that ought to be kept in mind, in every barring decision.

142. We rely on the line of authority which has set out that DBS is particularly well-equipped to make safeguarding decisions of this kind, and, in particular, the recent Court of Appeal judgment in *DBS v AB* [2021] EWCA Civ 157 (e.g. paragraphs 43-44, 55, 66-75). At paragraph 55 of *DBS v AB*, Lord Justice Lewis stated:

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

143. We also note the more recent UT case of *AB v DBS* [2022] UKUT 134 (ACC). In *AB v DBS*, the UT decided that *DBS v AB* precluded the UT from deciding upon an assessment of risk but not, as a matter of fact, whether there was a risk. That was a case on a different barring provision (i.e. "risk of harm" rather than "relevant conduct"); but even if *AB v DBS* was to be followed in the instant case, as representing a potentially more favourable position to IE, it would still not assist IE as he has not demonstrated that any conclusion by DBS that there was a risk, contained any error of law or fact; and, beyond that, the evaluation/assessment of risk is not a matter for the UT unless it is irrational.

144. As found above: the crux of this case relates to the findings of facts. If (as we have found) there was no material mistake on the most serious facts, it cannot properly be found that, on those facts, there was no "relevant conduct" or that the decision that it was appropriate to bar was either irrational or disproportionate.

145. Finally, it is clear from the documentation in the Bundle that proportionality of the impact of the barring decision upon the Appellant was specifically and properly considered by DBS [12] [154-155; 162-164]. It was expressly acknowledged that any conclusion to place IE on the List would have a significant adverse impact on his article 8 right to work (or volunteer) in his chosen field and/or earn money etc. The DBS decision-maker stated (among other things):

This negative impact is acknowledged by the DBS and therefore it is necessary to explore if there are any protective measures which may be put in place which would reduce the identified risk to an acceptable level.

146. The DBS went on to consider that. DBS concluded, rationally and correctly, that there were not; and that, as a consequence, it was reasonably necessary and appropriate to put IE on the List in order to properly safeguard vulnerable adults. No less restrictive option was/is available in order to achieve DBS's legitimate aim of adequately protecting vulnerable groups.

147. The decision to bar was not disproportionate and there was no error of law.

Conclusion and Disposal

148. Despite the valiant efforts of Ms Price and the quality of her representation, we have dismissed each ground of appeal.

149. We conclude for the purposes of section 4(5) of the Act that there were no mistakes of law in the DBS Decision to include the Appellant on the ABL. There were no material mistakes of fact upon which the Decision was based – there were some mistakes of fact but it is inevitable that the DBS would have reached the same conclusion even if it had not made these mistakes.

150. The Decision of the DBS to include the Appellant on the ABL is confirmed.

151. The appeal is dismissed.

Authorised for release: Judge Rupert Jones
Judge of the Upper Tribunal **Dated: 14 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 DBS has made a mistake —

(a) on any point of law;

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

(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.

(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.

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

(6) If the Upper Tribunal finds that DBS has made such a mistake it must—

(a) direct DBS to remove the person from the list, or

(b) remit the matter to DBS for a new decision.

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

(a) the Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and

(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.'

[Emphasis added]

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 when making its findings of relevant conduct in its barring decision. Thereafter on the appeal to the UT, the burden was on the Appellant 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).