IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-001471-V (formerly V/861/2021)

On appeal from the Disclosure and Barring Service

Between:

A.B.

Appellant

- v –

The Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Nicholas Wikeley
Upper Tribunal Member Josephine Heggie
Upper Tribunal Member John Hutchinson

Hearing date: 8 March 2022
Decision date: 11 May 2022

Representation:
Appellant: Mr Christopher Geering of Counsel, instructed by the RCN
Respondent: Mr Ashley Serr of Counsel, instructed by the DBS

DECISION

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

The decision of the Disclosure and Barring Service (DBS) taken on 26 February 2021 to include the Appellant's name in the Children's and Adults' Barred Lists did not involve a material error on a point of law or fact. The DBS decision is confirmed.

This decision and the Orders that follow are given under section 4(5) of the Safeguarding Vulnerable Groups Act 2006 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

ORDERS UNDER RULE 14

Pursuant to rule 14(1)(a) the Upper Tribunal orders that no documents or information should be disclosed in relation to these proceedings that would tend to identify any person who has been involved in the circumstances giving rise to this appeal.

Pursuant to rule 14(1)(b) the Upper Tribunal orders that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify the Appellant.

REASONS FOR DECISION

The outcome of this appeal to the Upper Tribunal in a sentence

1. This appeal is dismissed.

Some preliminary matters

2. This is Mr B's appeal against the Disclosure and Barring Service's final decision, dated 26 February 2021, to include him on both the Adults' Barred List and the Children's Barred List under the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act'). We note for the record that this case was originally registered with the Upper Tribunal Administrative Appeals Chamber as case number V/861/2021, but has now been allocated an updated reference (UA-2021-001471-V) under the Chamber's new case management system.

3. We held a remote hearing of this appeal on 8 March 2022. The appeal had been scheduled to be heard at a conventional face-to-face hearing in Leeds but was changed at the 11th hour to a remote hearing with the agreement of all concerned as a result of a Covid-19 related risk. We were satisfied it was fair and just to proceed in this manner. There were no significant technological difficulties in the hearing. The Appellant attended remotely but did not give evidence. He was ably represented by Mr Christopher Geering of counsel. The Respondent (the Disclosure and Barring Service) was equally ably represented by Mr Ashley Serr of counsel. We are very grateful to both counsel for the careful and well-focussed presentation of their respective cases.

The rule 14 Orders on this appeal

4. In this decision we refer to the Appellant as Mr B to preserve his privacy and anonymity. For that reason, we make the rule 14 Orders included at the head of this decision. We are satisfied that neither the Appellant nor his family should be identified, directly by name or indirectly, in this decision. We are also satisfied that any publication or disclosure that would tend to identify any person who has been involved in the circumstances giving rise to this appeal would be likely to cause serious harm to the Appellant and his family. Having regard to the interests of justice, we were satisfied that it is proportionate to make the rule 14 Orders.

The background to the barring decision

5. Mr B is a nurse with many years' professional experience. He has one daughter, in her 20s. The police received intelligence that someone at Mr B's

home address had been using an internet chat room to post that he had sexually abused his two daughters (allegedly) aged 15 and 12. The police attended the address and Mr B agreed to a voluntary interview (and to surrendering various computer hardware). In the course of the police interview, Mr B explained he used chat rooms to experiment online with different personas and sexual fantasies.

6. Mr B's devices were subject to forensic examination and were found to contain indecent photographs of children. In a subsequent police interview, Mr B stated that he did not know how the images came to be on his external hard drive and could not provide an explanation for them being there. Mr B was arrested and charged with three offences of making indecent photographs or pseudo-photographs of children. Subsequently, Mr B was formally acquitted following the Crown's decision to offer no evidence at trial. In summary, the CPS's expert forensic report could not show whether Mr B had viewed the images or was even aware of their presence on his computer.

7. Meanwhile, and before the trial, Mr B had been dismissed by his employer, who found proven the allegations that Mr B had viewed indecent images of children and used chat rooms to talk about sexual activity with children. There appears to have been no internal appeal or recourse to the Employment Tribunal in relation to his dismissal.

8. After his dismissal, the Nursing & Midwifery Council (NMC) imposed an interim suspension on Mr B. Following his acquittal at the Crown Court, the NMC then revoked the interim suspension order and decided not to proceed with regulatory proceedings against Mr B. The NMC appears not to have had sight of the transcripts of the police interviews.

The DBS investigation and the barring decision

9. Mr B's case was subject to an unfortunately protracted investigation by the Respondent as a result, in part at least, of the DBS changing its position mid-stream. For present purposes we need only summarise the chronology and the main features of the process.

10. On 1 May 2019 the DBS sent Mr B an "early warning letter" to the effect that it was considering whether to place him on one or both barred lists in the light of the police investigation referred to above (pp.26-33).

11. On 12 August 2020 the DBS sent Mr B's representative the first minded to bar letter, indicating that it did indeed appear to be appropriate to put him on both barred lists, and inviting representations on his behalf (pp.96-106). The allegation, at least as then framed, was that "on more than one occasion, Mr B engaged in conversations via online chat rooms regarding his sexual fantasies, including the sexual abuse of children." This was described as relevant conduct and so seen as falling within the 2006 Act, Schedule 3, paragraph 3 (as regards children) and paragraph 9 (as regards vulnerable adults). The letter explicitly found two allegations to be "unsubstantiated" and so disregarded, and in respect of which representations were therefore <u>not</u> being sought. These were that (1) Mr B had knowingly downloaded, stored and/or viewed numerous indecent images of children contained within a specified folder on his computer; and (2) Mr B had engaged in conversations via online chat rooms regarding his sexual abuse of his two daughters aged 12 and 15.

12. On 19 November 2020 Mr B's representative at the Royal College of Nursing made detailed representations on his behalf (pp.336-354). It is fair to say that those representations were excoriating in nature (and with some justification).

13. On 12 December 2020 the DBS issued a second and revised minded to bar letter (pp.367-376). On this occasion the primary allegation was one that had been abandoned in the first minded to bar letter. This was that "on more than one occasion Mr B has engaged in fantasy conversations via online chat rooms stating he had sexual activity with his two daughters who were 12 and 15 year old". This was categorised as a risk of harm (rather than 'relevant conduct'). As such, it was said to fall within the 2006 Act, Schedule 3, paragraph 5 (as regards children) and paragraph 11 (with respect to vulnerable adults). The second minded to bar letter added that it appeared Mr B had "continued to access the chat room 'chat step' where sexual activity with children was discussed and indecent images of children were posted". The letter continued: "although this does not fit the definition of relevant conduct, we have used this information to help us assess the level of concern in Mr B's case." The Appellant's representative again made detailed representations on his behalf (pp.604-634).

14. On 26 February 2021 the DBS issued its final decision letter (pp.647-655). The primary allegation in the second minded to bar letter was found to be proven. This letter notified Mr B that it had decided it was proportionate and appropriate to include him on both barred lists.

The grounds of appeal to the Upper Tribunal

15. Upper Tribunal Judge Jacobs subsequently gave Mr B permission to appeal (p.697). Having by now had sight of the DBS's Barring Decision Process document (pp.656-685), the Appellant advances three grounds of appeal.

16. Ground 1 is that the DBS was wrong to find that Mr B may harm/represents a risk of harm to children, or failed to provide adequate reasons for that finding.

17. Ground 2 is that the DBS was wrong to find that Mr B may harm/represents a risk of harm to vulnerable adults, or failed to provide adequate reasons for that finding.

18. Ground 3 is that the DBS was wrong to find it was proportionate to bar Mr B from working with children and/or vulnerable adults, or failed to provide adequate reasons.

19. Grounds 1 and 2 both raise a preliminary issue, namely whether the assessment of risk (e.g. of harm to children) is a finding of fact (and so appealable to the Upper Tribunal under section 4 of the 2006 Act) or not a finding of fact (and so not appealable). We address that question as a preliminary issue before considering the three grounds of appeal, but first we must summarise the statutory framework.

The statutory framework

20. There are, broadly speaking, three separate ways under Part 1 of Schedule 3 to the 2006 Act in which a person may be included on the children's barred list. The first is automatic inclusion without the right to make representations (paragraph 1). The second is inclusion subject to the right to make representations (paragraph 2). The third is what might be described as

discretionary barring. This may be on the basis of either an individual's past behaviour (paragraphs 3 and 4) or the risk of harm they pose now and for the future (paragraph 5).

21. Paragraphs 3 and 4, which deal with behaviour or 'relevant conduct', provide as follows:

> **3.**(1) This paragraph applies to a person if—
>
> (a) it appears to DBS that the person —
>
> (i) has (at any time) engaged in relevant conduct, and
>
> (ii) is or has been, or might in future be, engaged in regulated activity relating to children, and
>
> (b) DBS proposes to include him in the children's barred list.
>
> (2) DBS must give the person the opportunity to make representations as to why he should not be included in the children's barred list.
>
> (3) DBS must include the person in the children's barred list if—
>
> (a) it is satisfied that the person has engaged in relevant conduct,
>
> (aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
>
> (b) it is satisfied that it is appropriate to include the person in the list.
>
> (4) This paragraph does not apply to a person if the relevant conduct consists only of an offence committed against a child before the commencement of section 2 and the court, having considered whether to make a disqualification order, decided not to.
>
> (5) In sub-paragraph (4)—
>
> (a) the reference to an offence committed against a child must be construed in accordance with Part 2 of the Criminal Justice and Court Services Act 2000;
>
> (b) a disqualification order is an order under section 28, 29 or 29A of that Act.
>
> **4.**(1) For the purposes of paragraph 3 relevant conduct is—
>
> (a) conduct which endangers a child or is likely to endanger a child;
>
> (b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
>
> (c) conduct involving sexual material relating to children (including possession of such material);
>
> (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
>
> (e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate.
>
> (2) A person's conduct endangers a child if he—

(a) harms a child,

(b) causes a child to be harmed,

(c) puts a child at risk of harm,

(d) attempts to harm a child, or

(e) incites another to harm a child.

(3) "Sexual material relating to children" means—

(a) indecent images of children, or

(b) material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification.

(4) "Image" means an image produced by any means, whether of a real or imaginary subject.

(5) 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.

22. The alternative discretionary basis for barring is for 'risk of harm' (according to the heading to paragraph 5):

5.(1) This paragraph applies to a person if—

(a) it appears to DBS that the person—

(i) falls within sub-paragraph (4), and

(ii) is or has been, or might in future be, engaged in regulated activity relating to children and

(b) DBS proposes to include him in the children's barred list.

(2) DBS must give the person the opportunity to make representations as to why he should not be included in the children's barred list.

(3) DBS must include the person in the children's barred list if—

(a) it is satisfied that the person falls within sub-paragraph (4),

(aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and

(b) it is satisfied that it is appropriate to include the person in the list.

(4) A person falls within this sub-paragraph if he may—

(a) harm a child,

(b) cause a child to be harmed,

(c) put a child at risk of harm,

(d) attempt to harm a child, or

(e) incite another to harm a child.

23. There is, therefore, a fundamental difference between the two routes to a discretionary barring. The first applies where the DBS "is satisfied that the person *has engaged* in relevant conduct" (emphasis added). This self-evidently requires findings of fact about events in the past. The second applies where the DBS is satisfied that the person concerned *may* "harm a child, cause a child to be harmed, put a child at risk of harm" (etc). This equally plainly requires a predictive finding of fact as to the position now and what may happen in the future.

24. It will be recalled that in this case the first minded to bar letter sent to the Appellant proceeded on the basis that paragraphs 3 and 4 (behaviour or relevant conduct) were applicable, whereas the second minded to bar letter was based on paragraph 5 (risk of harm).

25. The three provisions relating to children (paragraphs 3-5 inclusive) are mirrored for vulnerable adults by paragraphs 9, 10 and 11 in Part 2 of Schedule 3, although those specific provisions need not be detailed here as there are no other material differences in the drafting.

26. Appeal rights against barring decisions are governed by section 4 of the 2006 Act:

> **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 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 DBS under subsection (6)(b)—

> (a) the Upper 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.

27. We now turn to the preliminary issue foreshadowed at paragraph 19 above.

Is an assessment of risk a finding of fact?

28. The Appellant's first ground of appeal (in part at least) is that "the DBS was wrong to find that Mr B may harm/ represents a risk of harm to children". Ground 2 is formulated in identical terms but with the substitution of vulnerable adults for children.

29. As noted above in the context of the statutory framework, the right of appeal to the Upper Tribunal is restricted in the sense that it is not a full merits review right of appeal. A person may appeal on the ground that the DBS has made a mistake "on any point of law" (section 4(2)(a)). A person may also appeal on the ground that the DBS has made a mistake "in any finding of fact which it has made and on which the decision … was based" (section 4(2)(b)). However, for these purposes "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)).

30. The question that confronts us head-on in this appeal is how a finding about a risk fits into this typology. The parties' respective positions can be starkly summarised as follows.

31. Mr Geering, for the Appellant, contended that the assessment of risk was an issue of fact that was appealable to the Upper Tribunal in the same way as any other mistake of fact on which the DBS based its decision. So, he submitted, the finding that Mr B may harm or represents a risk of harm to children was appealable.

32. However, Mr Serr, for the Respondent, submitted that the assessment of risk was a matter for the DBS and not for the Upper Tribunal.

33. Mr Serr relied principally on the judgment of the Court of Appeal in *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575; [2022] 1 WLR 1002 (which we refer to as *DBS v AB*) and in particular the final sentence of the following passage in the main judgment by Lewis LJ (emphasis in bold added):

> *Discussion*
>
> The respective roles of the DBS and the Upper Tribunal
>
> 43. By way of preliminary observation, the role of the Upper Tribunal on considering an appeal needs to be borne in mind. The Act is intended to ensure the protection of children and vulnerable adults. It does so by providing that the DBS may include people within a list of persons who are barred from engaging in certain activities with children or vulnerable adults. The DBS must decide whether or not the criteria for inclusion of a person within the relevant barred list are satisfied, or, as here, if it is satisfied that it is no longer appropriate to continue to include a person's name in the list. The role of the Upper Tribunal on an appeal is to consider

> if the DBS has made a mistake on any point of law or in any finding of fact. It cannot consider the appropriateness of listing (see section 4(3) of the Act). **That is, unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS.**

34. There is, with the greatest respect, some ambiguity in the highlighted passage. The Court of Appeal could be saying no more than that the assessment of the risk posed by an individual is part and parcel of the assessment of appropriateness for the purposes of deciding whether to place the individual on a barred list. That much would be entirely uncontroversial. Alternatively, the Court of Appeal could be saying that the question as to whether the person concerned poses a risk is invariably a non-factual matter which is conceptually separate from the assessment of appropriateness. This reading raises complex issues, for the reasons we explore below. But either way the Court of Appeal certainly appears to be saying that the assessment of risk is non-appealable.

35. In support of his contention that the evaluation of risk was not a finding of fact, Mr Serr also drew our attention to paragraph [55] of Lewis LJ's judgment (under the heading 'The findings of fact made by the Upper Tribunal'):

> 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.

36. Mr Geering's submission, on the other hand, was that *DBS v AB* was distinguishable in that it was a case concerned with barring under paragraph 3 (behaviour or relevant conduct) and not with barring under paragraph 5 (risk of

harm) of Schedule 3. This distinction, he argued, was important for the following reasons.

37. Under paragraph 3(3) of Schedule 3, the DBS is required to include a person on the children's barred list if it (using the same unhelpful paragraph lettering system adopted by the legislation):

> (a) is satisfied that the person has engaged in relevant conduct;
>
> (aa) has reason to believe the person is, or has been, or might be engaged in regulated activity with children; and
>
> (b) is satisfied that it was appropriate to include the person on the list.

38. There was, therefore, no separate requirement of a risk of future harm under paragraph 3, and any risk assessment in relevant conduct cases was part and parcel of the evaluation of appropriateness under paragraph 3(3)(b), which was subject to the exclusionary rule under section 4(3).

39. Mr Geering submitted that paragraph 5(3) is different and so the dicta of the Court of Appeal in *DBS v AB* did not apply. True, paragraph 5(3) has a three-fold series of conditions in the same way as paragraph 3(3). Sub-paragraphs (aa) and (b) also mirror the conditions in paragraph 3(3) (engaging in regulated activity with children and appropriateness). However, the requirement in sub-paragraph (a) is materially different. Rather than the DBS having to be satisfied that the person has engaged in (past) relevant conduct, it requires the DBS to be satisfied that the person falls within paragraph 5(4). That provision in turn covers a person who prospectively "may (a) harm a child, (b) cause a child to be harmed, (c) put a child at risk of harm (etc)". As such, Mr Geering contended, a mistake by the DBS as to risk assessment under paragraph 5 is a mistake as to a finding of fact that is appealable to the Upper Tribunal – as it is only the issue of appropriateness under paragraph 5(3)(b) that is caught by the rule in section 4(3) of the 2006 Act.

40. We reject Mr Geering's ingenious argument that we can distinguish the Court of Appeal's decision in *Disclosure and Barring Service v AB* and so confine the Court's observations about risk assessments solely to paragraph 3 (relevant conduct) cases. We do so for two main reasons.

41. The first is a relatively narrow point of statutory construction. We do not accept the proposition that only paragraph 5(3)(a) involves issues of risk assessment, separate from the evaluation of appropriateness under paragraph 5(3)(b), whereas paragraph 3(3)(a) does not. We note that relevant conduct for the purposes of paragraph 3 is defined by paragraph 4(1)(a) to include "conduct which endangers a child or <u>is likely to</u> endanger a child" (our emphasis). Furthermore, a person's conduct endangers a child if it harms a child, causes a child to be harmed or puts a child at risk of harm (etc: see paragraph 4(2)). The assessment of risk distinct from appropriateness may therefore be as much a feature of paragraph 3 as it is of paragraph 5. We therefore do not accept the dichotomy that Mr Geering urged us to find.

42. The second is a more fundamental reason. It is undoubtedly true that the Court of Appeal in *DBS v AB* was concerned with what was (on its facts) a paragraph 3 case of retrospective relevant conduct, rather than a prospective risk of harm case under paragraph 5. However, on no fair reading can the Court of Appeal's

observations at paragraph [43] be regarded as being confined to paragraph 3 cases and so to the exclusion of paragraph 5 cases. In the passage of the judgment immediately preceding paragraph [43], Lewis LJ had just summarised the parties' submissions on the DBS's first two grounds of appeal in that case, relating to errors of law and fact (paragraphs [37]-[42]). Paragraph [43] is then the opening paragraph in the Court of Appeal's discussion of the respective roles of the DBS and the Upper Tribunal. It is expressed throughout in general terms, rather than being anchored exclusively in a consideration of paragraph 3 cases (as distinct from paragraph 5 cases). The passage is apparently categorical (but subject to the ambiguity noted at paragraph 34 above) in its statement that "the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS". The message that the assessment of risk is a matter for the DBS, and not for the Upper Tribunal, is further and firmly reinforced by Lewis LJ's further analysis at paragraph [55] (see above at paragraph 35).

43. We recognise that the characterisation of a risk assessment as not being an issue of fact is potentially problematic. The boundary between what is an issue of fact and what is not an issue of fact is a notoriously fluid one. Mr Geering, in his revised grounds of appeal, relied in part upon the reported decision[1] of the Upper Tribunal (Farbey J, Upper Tribunal Judge Jacobs and UT Specialist Member Ms Joffe) in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC); [2021] AACR 3, and in particular the italicised passage in paragraph 40 cited below (Mr Ben Jaffey QC appeared for the DBS in this case, as he did in *DBS v AB*):

> 39. There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. This includes matters such as who did what, when, where and how. It includes inactions as well as actions. It also includes states of mind like intentions, motives and beliefs.
>
> 40. Mr Jaffey argued that facts did not include the factors relevant to the assessment of the risk and the need for protection that was the focus of the appropriateness to include a person on a list. He criticised some statements in some of the Upper Tribunal's decisions he cited for trespassing over that boundary. He is right that that the tribunal's jurisdiction at the mistake phase has to be limited to finding a mistake of law or fact. He is also right that labelling something as a finding of fact does not of itself make it one. But *we are sceptical whether the line between findings of fact and factors relevant to assessing risk is so clear in principle or so easy to draw in practice as his argument suggested. A simple example makes the point. Suppose the tribunal comes to the conclusion – a deliberately neutral expression - that the appellant has a propensity for risky behaviour. That is a finding of fact about character,*

[1] A 'reported decision' of the Upper Tribunal Administrative Appeals Chamber, as published in the AACR series, is one that commands the broad assent of the majority of the Chamber's salaried judges and should be followed by the Upper Tribunal and First-tier Tribunals in preference to an 'unreported decision': see Commissioner's decision *R(I) 12/75* and *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC).

> *personality and behaviour, which relates to the present and to the future. It is also a factor that is relevant to the assessment of risk, again present and future.* In neither case is it likely to be decisive. As both a finding and a risk factor, it will have to be assessed in the context of the other findings or factors as a whole. There is no reason why it has to be classified as one or the other; findings and risk factors are not mutually exclusive categories. Nor is it necessary to split it into parts, consisting of a finding about the present, separated from the element of future risk. At the best, such an exercise is artificial; at the worst, it is unworkable. The reality is that the conclusion is both a finding and a risk factor. It is pointless to require a tribunal to draw a distinction that does not exist.
>
> 41. The mistake may be in a primary fact or in an inference. There was a discussion at the hearing about primary and secondary facts and about inferences. It became clear that these terms were used in different senses, so we need to make clear what we mean. A primary fact is one found from direct evidence. An inference is a fact found by a process of rational reasoning from the primary facts as a fact likely to accompany those facts.

44. We consider, with respect, there is considerable force in the Upper Tribunal's observations in *PF v DBS*. However, this analysis, and in particular the italicised passage relied upon by Mr Geering in the extract from paragraph 40 of the decision as cited above, must now be read in the light of the Court of Appeal's decision in *DBS v AB*, as Mr Serr contends. We note in this context that *PF v DBS* was decided more than a year before *DBS v AB*, but is not referred to in the Court of Appeal's judgment. However, the Weekly Law Reports (WLR) version of *DBS v AB* confirms that *PF v DBS* was cited in argument before the Court of Appeal. To complicate matters further, we also understand that the Court of Appeal refused the DBS permission to appeal from the Upper Tribunal's decision in *PF v DBS*. That said, the doctrine of precedent requires us to follow the Court of Appeal's decision in *DBS v AB* insofar as there may be any difference of view with the Upper Tribunal in *PF v DBS* as to the legal principles involved.

45. The question is then where this all leaves the Upper Tribunal in practical terms in the exercise of its appellate jurisdiction in safeguarding cases.

46. On the one hand, the Court of Appeal has stated that "the assessment of the risk presented by the person concerned… is a matter for the DBS" (*DBS v AB* at paragraph [43]).

47. On the other hand, in cases in which the DBS relies on a risk of harm under paragraph 5 of Schedule 3, rather than 'relevant conduct' under paragraph 3, the Upper Tribunal may have to determine as a question of fact whether a person "may—(a) harm a child, (b) cause a child to be harmed, (c) put a child at risk of harm" (etc) (see paragraph 5(4)).

48. There is, in our view, a way of squaring this circle while respecting both Court of Appeal authority and the primacy of statute (and in particular section 4(1) to (3) of the 2006 Act). We return to the ambiguity we identified in the passage from *DBS v AB* discussed at paragraph 34 above. We are satisfied that the Court of Appeal was saying no more than that the element of the risk assessment which is part and parcel of the assessment of appropriateness for the purposes of deciding whether to place the individual on a barred list is non-appealable. This

reading is consistent with the fact that any decision taken under paragraph 5 of Schedule 3 – which, as we have seen, necessarily includes some findings as to risk – to include an individual on the Children's Barred List is undoubtedly appealable (see section 4(1)(b)). To that extent we do agree with Mr Geering.

49. In this context, however, we make a distinction between (i) deciding as a matter of fact whether a person poses a risk; and (ii) deciding on the level of the risk posed by way of a risk assessment.

50. The decision as to (i) in the previous paragraph is a binary choice. Either a person is found to pose a risk or he is not regarded as posing any risk. So, for example, the Upper Tribunal is not confined to determining findings of fact as to past conduct under paragraph 3 of Schedule 5. It also has jurisdiction to decide whether the criteria in paragraph 5 (which is headed, of course, 'Risk of harm') are made out (other than appropriateness, of course). This might involve, for example, a finding that a person "may … harm a child" – this is a finding of fact, albeit it involves an element of prediction as to what may happen in the future. It is as much a finding of fact as a finding that an individual may develop a certain medical condition in 10 years' time after having suffered a particular type of accident.

51. However, the decision as to (ii) in paragraph 50 is not a binary choice. The level of risk that a person poses may be low, moderate or high (or whatever other scale is used). Accordingly, risk assessment in this sense is an estimation of the potential harm posed by an individual (both in terms of the likelihood of the risk eventuating and the degree of harm involved). This type of assessment is dependent on a multifactorial review of key variables that are both static and dynamic in nature, and context dependent. Put more simply, the assessment of the level of risk is a matter of weighting for the decision-maker. This is the type of risk assessment which is often fundamental to the question of appropriateness and over which the DBS has exclusive jurisdiction.

52. We therefore proceed on the basis that we can decide type (i) risk issues but not type (ii) risk assessments.

Ground 1

53. Ground 1 is that the DBS was wrong to find that Mr B may harm/represents a risk of harm to children, or failed to provide adequate reasons for that finding.

54. This was the Appellant's central challenge to the DBS's decision and so we devoted most of our consideration to this ground of appeal.

55. The DBS's findings and reasons are set out in its Barring Decision Process document, the main points from which were summarised in the final decision letter. Mr Geering's primary argument was that the DBS had erred in moving directly from finding an allegation proven on the balance of probabilities to a finding of fact that Mr B represented a risk of harm to children. The allegation found to be proven by the DBS (see pp.660-664) was that "on more than one occasion Mr B has engaged in fantasy conversations via online chat rooms stating he had sexual activity with his two daughters who were 12 and 15 year old". The consequential finding was that he "represents a risk of harm to children" (p.666). Mr Geering's submission was that the DBS had not established the necessary linkage between the allegation and the supposedly consequential finding.

56. Mr Geering further argued that in order for the finding to be justified, there had to be a risk to actual children. He emphasised that this was not a 'relevant conduct' case (under paragraph 3) but a 'risk of harm' case (under paragraph 5). As such, it was not enough for the DBS to show simply that the conduct found proven in the allegation might be repeated. It had to be shown that the conduct would escalate and transmute into actual harm to a child. The assessment that Mr B posed a risk of harm had to take into account all the circumstances. In particular, it was clear that the comments Mr B had posted were entirely divorced from reality – he had referred to fictional children as part of exploring sexual fantasies through different persona online. There was no suggestion of any intention to harm actual children. Furthermore, there was a series of considerations which undermined the suggestion that there might be any likely progression or escalation. So, for example, the police investigation supported his position that he had never searched for or deliberately downloaded any illegal imagery. The Appellant has no cautions or reprimands, let alone any criminal convictions, which might indicate a propensity to harm a child. He had an unblemished professional career as a nurse spanning three decades. There had been no repetition of the inappropriate behaviour since the isolated incidents of December 2016.

57. In support of his arguments Mr Geering also sought to rely on the decision in *R v Lea* [2011] EWCA Crim 487, where the defendant had been convicted of possession of a considerable quantity of child pornography. The defendant had been made subject to a Sexual Offences Prevention Order (SOPO), preventing him from having contact with children. That part of the order was struck down on appeal as there was no evidence of "a likely progression towards contact offences". However, we doubt there can be a direct read across from case law in the criminal justice system to the safeguarding regime. As the Divisional Court has observed, "the function of DBS is a protective forward-looking function, intended to prevent the risk of harm to children by excluding persons from involvement in regulated activities. DBS is not performing a prosecutorial or adjudicatory role" (*R (on the application of SXM) v The Disclosure and Barring Service* [2020] EWHC 624 (Admin) at paragraph [38]). Furthermore, as the Divisional Court also reminded us in the same case at paragraph [61]:

> it is important to bear in mind the differences between the functions of a prosecuting authority and those of the DBS. The DBS is not a prosecuting authority. It is not adjudicating on individual allegations by a victim. It is carrying out child protection functions concerning those taking part in regulated activities which might bring them into contact with children in future. Whilst it may take into account, amongst other things, conduct said to have been engaged in by those referred to it, the function of the DBS, unlike the criminal courts, is not to adjudicate on whether individuals have been guilty of particular misconduct in the past or to impose penalties.

58. We deal with Mr Geering's other arguments once we have summarised Mr Serr's submissions.

59. Mr Serr, for his part, itemised the specific facts derived from the Appellant's police interviews which had underpinned the DBS's conclusion that the allegation about online fantasy conversations involving sexual abuse of children had been made out. Taken both individually and collectively, these matters had

given the DBS considerable cause for concern. Those facts were set out as follows in Mr Serr's skeleton argument (in this extract, A = Mr B):

> 30.1 The police interview itself was prompted by a complaint from a person in the chat room that A had been on the site and said that he was involved in sexual activity with his daughters aged 12 and 15. The police obtained A's IP address leading to his arrest.
>
> 30.2 He does not deny the allegation when put to him - p.262. He then gives further details about the date and time - p.263 and accepted that it was stupid and wrong and that he potentially needed psychological help - p.264.
>
> 30.3 The name of the chat room was FYRST BUSH - which had obvious paedophilic connotations - p.264.
>
> 30.4 His user name on the site was 'daddy'- p.265.
>
> 30.5 He accepted that it was very, very unpleasant and not something he was proud of - p.265 and had happened on more than one occasion - p.270.
>
> 30.6 He also indicates that while using the site he took on the persona of a teenage girl sending images of girls of 15 and 16 - p.268.
>
> 30.7 He appears to have been accused of being a paedophile by other site users - p.271.
>
> 30.8 He was still using the chat room as of the week before the police interview [in February 2017] - pp.272/649. This was despite the fact that he had cause to report content on the site on a number of occasions - p.270.
>
> 30.9 A agreed to a summary of that interview in the second police interview in September 2017 - pp.284-285.

60. We note that in his submissions Mr Geering did not seek to challenge any of those 'micro' findings of fact. It was more that Mr Geering was drawing our attention to other factors which he argued demonstrated that there was no risk of harm. Nor did we hear direct oral evidence from Mr B to cast any doubt on those findings. We read both police interviews and agree with Mr Serr that those findings as set out above are all amply supported by that evidence. Indeed, there were several other passages in the police interviews that gave us further cause for concern which were not highlighted by the DBS in its decision-making process.

61. For example, in the first police interview Mr B appeared to be suggesting that he could not remember which sites he had entered and gave the impression he had just been experimenting for a short time (p.263). However, he admitted he had other user names to access sites (e.g. "Dougie Smith" and "Gentleman's relish", p.266, both of which carry sexual connotations) and conceded he had repeated the activity on a number of occasions (p.270). There were also inconsistencies in his account. For example, in the second police interview he initially stated that he did not know how indecent images had come to be found on his computer (p.288). Shortly afterwards, however, he referred to images being "inadvertently downloaded … I do remember that happening a few times"

(p.288). We are satisfied on the evidence overall that Mr B's online activity on suspect sites was repeated over a period of time, under different pseudonyms, despite him knowing that it was wrong as indecent images were being shared.

62. Mr Serr explained that it was not simply the findings of fact itemised in paragraph 59 above which had led the DBS to make its finding of risk. The Barring Decision Process document referred to several other features of the case to support the finding of risk. These included the fact that in April 2017 Mr B had lied to his employers, stating he had been in a chat room for car enthusiasts and had reported someone else for inappropriate comments, when in fact a third party had reported him to the police. The Appellant had given a completely different explanation in May 2017 and then again in the July 2017 interview with his employer, which led to his dismissal for gross misconduct. Furthermore, despite the Appellant acknowledging that he may have a problem, there had been no evidence adduced of any treatment or counselling to address such a problem.

63. We also agree with Mr Serr's responses to the various points raised by Mr Geering. For example, the DBS was well aware that Mr B had been talking about fictional children, rather than real children, but that does not in itself negate risk (see e.g. *CD v DBS* [2000] UKUT 219 (AAC)). The DBS had also noted the Appellant's character references and previous good conduct. The fact that there had been no repetition in the intervening four years or so might have carried more weight if there had been evidence of treatment or counselling. We would add that the discontinuance of the criminal charges does not really assist the Appellant as the DBS expressly found that the specific allegation about indecent images having been "knowingly downloaded" had not been substantiated.

64. In the light of all these considerations, we do not find the main premise of Ground 1 in this appeal to have been made out. There is no material mistake of fact or relevant error of law in the DBS's conclusion that Mr B may put a child at a risk of harm within paragraph 5(4)(c) of Schedule 3 to the 2006 Act. The assessment of the level of that risk in the context of the question of appropriateness is a matter for the DBS.

65. There is an associated challenge by Mr Geering to the adequacy of the reasons provided by the DBS. The relevant test was laid down by the Court of Appeal in *Khakh v Independent Safeguarding Authority* [2013] EWCA Civ 1341 at paragraph [23] *per* Elias LJ:

> I would accept that the ISA must give sufficient reasons properly to enable the individual to pursue the right of appeal. This means that it must notify the barred person of the basic findings of fact on which its decision is based, and a short recitation of the reasons why it chose to maintain the person on the list notwithstanding the representations. But the ISA is not a court of law. It does not have to engage with every issue raised by the applicant; it is enough that intelligible reasons are stated sufficient to enable the applicant to know why his representations were to no avail.

66. Applying that test, and generally for the reasons set out above, we conclude that the DBS's reasons were adequate, even if they might have been better

expressed and more fully evidenced. However, the test for reasons is adequacy and not optimality let alone perfection.

Ground 2

67. Ground 2 is that the DBS was wrong to find that Mr B may harm/represents a risk of harm to vulnerable adults, or failed to provide adequate reasons for that finding.

68. The DBS summarised its reasoning on this point in its decision letter as follows:

> Furthermore, we are also satisfied that your name should also be placed on the Adults' Barred List as we have concerns about you working with vulnerable adults as it is not known what is driving your sexual behaviour. It could be the fact that children are vulnerable, immature or that you could exert power and control over this vulnerable group. Vulnerable adults can also be immature, vulnerable and you could in a position of power and therefore there is a risk that you may engage in inappropriate sexual conduct with this vulnerable group.

69. It is fair to say that the DBS's Barring Decision Process document does not take the Respondent's reasoning any further forward (see e.g. pp.676 and 684).

70. Mr Geering's submission was that the DBS, having found that Mr B represented a risk to children, simply asserted that he also represented a risk to vulnerable adults, but without any additional reasoning. Mr Geering observed that none of the Appellant's chat room activity suggested any sexual interest in vulnerable adults whatsoever. Furthermore, Mr B had himself worked with vulnerable adults for some 30 years in a professional capacity and throughout that time there had been no reported abuse of trust and no such risk had ever manifested itself. Yet the DBS's justification for barring the Appellant in relation to vulnerable adults amounted to no more than a concern that it did not know what were the drivers for Mr B's actions and so he might act in the same way with vulnerable adults. This was an "extraordinary leap" and based on no evidence. In short, the DBS had ignored its own guidance to the effect that findings "must not be based on guesswork, preconceptions, suspicion or speculation".

71. Mr Seer reiterated his submissions about the role of the DBS in issues of risk assessment. He argued that the DBS was entitled to form the view that there were concerns about Mr B working with vulnerable adults, given it was not clear what was driving the Appellant's sexual interest in relation to children. The older of the two fictitious daughters was relatively close in age to an adult. However, this was not simply a case (as Mr Geering had argued) of the DBS finding there was a risk of harm to children and assuming without more that there was also a risk to vulnerable adults. The DBS was entitled to have regard to a constellation of factors in making its risk assessment. This was not limited to sexual matters discussed online by the Appellant in relation to children but went wider. Mr B had not simply failed to disclose relevant facts to his employer but he had actively sought to mislead the NHS Trust about his role. Mr Seer argued that this lack of transparency with, and deception of, his employer gave rise to potential safeguarding risks to vulnerable adults, as there was no reason why such behaviours should be confined to children.

72. We have found this aspect of the appeal to be especially problematic. We recognise there is some force, superficially at least, in Mr Geering's submission

that, putting it more bluntly than counsel did, the DBS had jumped to the conclusion that Mr B should be barred from working with vulnerable adults in the absence of, and indeed contrary to, any relevant evidence. On reflection, however, while we accept that the DBS's reasoning on the point was somewhat compressed, if not cursory, we were not ultimately persuaded by that submission. Mr Geering asks us to conclude that, properly analysed, Mr B represents *no* risk to vulnerable adults (Mr Geering's emphasis). We do not consider we can say that. We readily accept that he probably poses less of a risk to vulnerable adults than he does to children, but there remains *some* risk for the reasons outlined by Mr Seer. On the basis of the Court of Appeal authority discussed above, the assessment of the level of that risk is a matter for the DBS and not for the Upper Tribunal.

73. We recognise that Mr Geering also relies on *R v Parsons* [2017] EWCA Crim 2163, where the Court of Appeal quashed a SOPO preventing contact with all children because the offender's sexual offending and interest was confined to female children only. Mr Geering seeks to draw an analogy with the present case, where he argues there is no suggestion of any sexual interest in vulnerable adults. In our assessment the analogy does not hold good, not least given the very different objectives of the criminal justice process and the safeguarding jurisdiction. We refer back to our discussion of the Divisional Court's decision in *R (on the application of SXM) v The Disclosure and Barring Service* [2020] EWHC 624 (Admin) (see paragraph 57 above).

74. It follows that we find Ground 2 is not made out, notwithstanding the somewhat cursory nature of the DBS's reasoning in the matter.

Ground 3

75. Ground 3 is that the DBS was wrong to find it was proportionate to bar Mr B from working with children and/or vulnerable adults, or failed to provide adequate reasons.

76. It was common ground before us that the Upper Tribunal is empowered to consider the proportionality of a DBS decision to bar an individual under Schedule 3 (see *B v Independent Safeguarding Authority* [2012] EWCA Civ 977). A barring decision that is disproportionate is one that involves an error of law and so is appealable under section 4.

77. Mr Geering's principal submission was that it was inherent in the notion of proportionality that the DBS had to balance the degree of risk posed by the individual with the degree of hardship involved for that person with being barred. The DBS case was that there was a 'significant' risk of harm. However, Mr Geering contended this conclusion was unsustainable given that the DBS's findings related to a handful of isolated incidents in a limited time window, there had been no 'relevant conduct', there had been no repetition in the following four years or more, and there had never been any complaints with regard to vulnerable adults in a long professional career spanning more than three decades. Weighed against these considerations were the inevitable and devastating financial, professional and reputational consequences of barring. In that context, he argued, the level of any risk was manifestly insufficient to render the barring decision proportionate.

78. Mr Seer, in response, repeated his argument that the assessment of risk itself was a matter for the DBS to determine. But even putting that submission to one side, Mr Seer contended that the findings made against Mr B were not trivial. While in his 'day job' of professional practice as a nurse, he had in his spare time, adopting the moniker 'daddy', repeatedly used an internet chat room with a paedophilic title. He had stated on more than one occasion to other users that he was involved in sexual activity with his (admittedly fictitious) 15 and 12 year old daughters. After being reported to the police he had failed to inform his employer, an NHS Trust, and when confronted had lied about the nature of the site and had misleadingly claimed that he was the person who had reported inappropriate comments rather than the perpetrator. In those circumstances the decision to place the Appellant on the barred lists could not be characterised as disproportionate.

79. We agree with Mr Seer's analysis. We recognise the very serious consequences that either do flow or may flow from a decision to bar. However, it seems to us that the fate of this ground of appeal is inextricably bound up with the outcome of the first two grounds of appeal. We find it hard to envisage in practice a case in which those grounds of appeal were both to fail and yet the decision to bar would nonetheless be found to be disproportionate. Be that as it may, we find the decision to bar was proportionate in any event, given the findings of fact made by the DBS. Indeed, in our view the DBS could have made out a still more compelling case for barring if it had used more of the material gleaned from the two police interviews. In that context more generally we were concerned about the lack of attention to detail in some aspects of the Barring Decision Process document. This was illustrated by the repeated references to the Appellant in that document as a doctor, when he is fact a qualified nurse.

Conclusion

80. It follows from our reasons above that the Appellant's appeal to the Upper Tribunal is dismissed.

Nicholas Wikeley
Judge of the Upper Tribunal

Josephine Heggie
Specialist Member of the Upper Tribunal

John Hutchinson
Specialist Member of the Upper Tribunal

Approved for issue on 11 May 2022