THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2022-001065-V
[2024] UKUT 126 (AAC)

On appeal from a decision of the Disclosure and Barring Service

Between: AA Appellant

and

The Disclosure and Barring Service Respondent

Before: Upper Tribunal Judge Perez, John Hutchinson and Suzanna Jacoby

Decided on 18 April 2024 following an oral hearing in person in Birmingham on 28 February 2024

Representation:
Appellant: The appellant represented herself
DBS: Mr Ashley Serr of counsel

ANONYMITY ORDER

On 5 May 2023, Upper Tribunal Judge Hemingway made the following order, which remains in force—

"Pursuant to rule 14 of the above Rules, the Upper Tribunal grants anonymity to the individuals referred to in the documentation which relates to this case as "child", "parent" and "young person" (three separate individuals). Accordingly, no person shall, without the consent of the Upper Tribunal, publish or reveal the name or address of those individuals or any information which would be likely to lead to the identification of any of them or any family member of any of them, in connection with these proceedings.

Further, the Upper Tribunal takes the opportunity to remind the parties and anyone who may read these directions of the content of Section 97(2) of the Children Act 1989 as follows:

(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely to identify-

(a) any child as being involved in any proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child, or

(b) an address or school as being that of a child involved in any such proceedings.".

DECISION

1. The appeal is allowed to the extent of remittal.

REASONS FOR DECISION

A. Introduction

2. The appellant appeals to the Upper Tribunal against the DBS's decision communicated in a letter dated 6 April 2022 to include her in the children's barred list (pages 76 and 145). Permission to appeal was given by Upper Tribunal Judge Hemingway, on 1 August 2023 (page 186).

B. Factual and procedural background

3. We are setting out at paragraphs 4 to 13 below the undisputed facts, except where we say otherwise, in which case we will say what we make of the evidence. As to whether there were the two mistakes of fact mentioned in the grant of permission, we save that for the analysis part of this decision.

4. The appellant was 29 at the date of the incident in this case. She arrived in the UK from Nigeria in 2019. She has a master's degree in project management. She was an office worker from 2015 to 2019. She became a carer/support worker in March 2020. She had switched from project management to care work because she was going to move into social work, and because she planned eventually to become a qualified social worker. The appellant joined an employment agency in July 2020. That was the agency which supplied the appellant to the children's residential home at which the incident occurred. The home had approached the agency mid-pandemic for help due to having shortages in the team.

(1) Conduct

5. This case concerns an incident on the evening of 26 August 2020 at the residential home, while she was on shift there as a support worker. Three children lived there. One of them was a boy of nearly 13, L. He had ADHD, oppositional defiant disorder and ASD.

6. On the evening in question, the appellant was on shift with three other colleagues, AD, DJ and PR. It appears to be common ground, and we accept in any event, that, having returned to the home from a trip to the cinema and McDonald's, L started spitting water at the appellant. This took place in an open area off which was, among other things, an office. This open area was referred to variously in the evidence as "*the lounge*", "*the lounge area*", *the reception*", "*the reception area*" and "*reception*". L was taking the water from his water bottle. The appellant told us, and we accept, that she took the water bottle out of L's hand. We do not have the appellant's contemporaneous account written in the hour or so that followed, when her memory was most fresh. She told the police three and a half months later, on 7 December 2020, that the child had then punched her and kicked her. The appellant's solicitors said in their 18 March 2022 letter to the DBS, some 19 months after the incident, that L had punched the appellant and tried to kick her. By the time of the 28 February 2024 hearing before us, three and a half years after the incident, the appellant's recollection appeared less precise; she recalled the kicking rather than

the punching, although she did also refer at the appeal hearing to L hitting her. We accept that L assaulted the appellant, by kicking her and/or by punching or hitting her. We accept too that he had already assaulted her (as Mr Serr accepted) by spitting the water at her. We find that, when L assaulted the appellant by kicking her and/or by punching or hitting her, the appellant then screamed. We accept that, as appears from the Serious Incident Report (and accepted by Mr Serr), the part of the incident we have described so far occurred (i) out of AD's sight and before AD came out of the office, and (ii) out of DJ's sight. We find that, as is also accepted, it was also out of sight of PR; he had gone off-site to collect another child. We find that AD came out of the office on hearing shouting.

7. We find that the rest of the incident played out as set out in the following extract from the Serious Incident Report at pages 54 and 55, adduced by the DBS. We accept the entirety of this extract except that we make no finding as to whether it was AD who asked the appellant to write it down, given that the appellant says BD was the one who asked. Where this extract gives direct speech quotations, we find only that those things were said; we make no findings as to their truth—

> "AD was in the office stock checking the medication and heard shouting from the reception area from [L] and [the appellant] (Agency staff). AD went immediately out into the reception area. [L] was standing near the front window of the reception area near the radiator and [the appellant] was standing in front of [L]. AD saw [the appellant] swinging her arms in an over arm motion in the direction of [L] connecting with his body (chest and shoulders)
>
> DJ hearing the shouting immediately came out of the dining room and straight into the reception asking what was going on, unaware that PR had left the building to pick up young person SG.
>
> [L] was shouting at the top of his voice and was standing in front of the chair near the radiator by the snug window, his t shirt soaking wet. [L] was raging, puffing up his chest and clenching his fists calling [the appellant] a fucking cunt and black bitch. [The appellant] was standing not too far away from [L]. [L]'s drinks bottle was lying empty on the carpet by [L]'s feet.
>
> AD was trying to calm [L] down. DJ stood between [L] and [the appellant] asking [L] to calm down and tell her what was wrong. [L] said "that fat bitch has thrown water all over me and I'm going to punch her right in her fucking face the bastard" [L] was trying to get to [the appellant] by trying to barge past DJ, his fists were clenched and face was red with rage. AD and DJ asked [L] several times to calm down but he continued to try and get to [the appellant].
>
> [The appellant] stood behind DJ, she said something that DJ couldn't quite make out but AD heard [the appellant] say "if he hits me I'll hit him back I'm not scared of him" AD guided [L] away with a half shield to his room. DJ followed and asked [L] again to calm down. He immediately went back into reception, calling [the appellant] a Black Cunt and that he was going to punch her.
>
> [L] opened the front door and started to walk up the drive. AD offered to go for a walk with [L] to help him calm down which he refused and also refused the offer of a dry t shirt instead taking off his soaking wet one throwing it on the floor.
>
> [L] started pacing around the drive. [L] picked something up, like a small stone, off the drive and threw it through the open door where [the appellant] was standing.

> [The appellant] then closed the front door and sat on the sofa in the reception area.
>
> [L] then started to kick the front door continuing to threaten and swear at [the appellant] calling her a fucking fat black bitch and black cunt who he was going to "get" He asked if the car in the drive was [the appellant's] as he was going to destroy it. DJ told [L] no it was hers.
>
> [L] went to the side window and was punching it with some force. He then made a racial slur towards [the appellant] calling her a Fucking Nigger. DJ told [L] to stop it as he could be arrested by saying the N word. [L] said he didn't care. DJ asked AD to ask [the appellant] to leave as it wasn't helping that [the appellant] was sitting by the window in reception just staring out at us whilst we were trying to deal with [L].
>
> AD went into the house and asked [the appellant] to go into the sleeping in room with a pad and pen and write down what had happened. DJ stayed outside with [L] who then facetimed his mum on his mobile. [L] told his mum that a member of staff had hit him and that he could call the police and get her sacked.".

8. Acting Assistant Team Manager, BD, arrived on scene later the same evening. He spoke to the appellant alone in a separate room. He later alleged that the appellant had admitted to him in that conversation that she had hit L. We deal with that allegation in the analysis part of this decision.

9. BD sent the appellant home.

10. The police attended the home the day after the incident, according to BD's report dated the day after the incident. According to that report, the police spoke to AD and to L. The police later said they had no formal statements from anyone and that the other staff member, which must have been DJ since PR had not been a witness, did not wish to give a statement.

11. At some point, DJ of the home had a meeting with TM of the home to brief him about the incident. TM is described on page 58 as "*Team Manager / Assistant*". He appears to be senior to DJ, AD, PR and BD. DJ and AD initialled the undated debrief note of that meeting (pages 60 and 61).

12. The appellant attended a voluntary interview with the police on 7 December 2020. The child did not wish to support a prosecution against the appellant. The appellant did not want charges brought against him; she cited his vulnerability.

13. A Local Authority Designated Officer Joint Evaluation Meeting was held on 3 March 2021 (pages 106 to 110). It was attended by TM (said to be Team Manager at the home), BD (Acting Assistant Team Manager at the home, who arrived on scene the evening of the incident), DC Annmarie Brown of Northamptonshire Police, Andy Smith (Designated Officer) and Nicky Mitchell (minute taker). BR, the business manager of the employment agency which had supplied the appellant to the home, gave apologies and did not attend.

(2) Barring process

14. The appellant's employment agency made a referral to the DBS dated 22 March 2021 (page 29).

15. At some point after that referral had been made and before the DBS sent the Minded-to-Bar letter, it appears (from the Minded-to-Bar letter) that the DBS sent the appellant an early warning letter. The early warning letter told her that the DBS was considering including her in one or both lists.

16. The DBS sent the appellant a Minded-to-Bar letter dated 8 February 2022 (pages 23 to 26). The Minded-to-Bar letter informed the appellant that the DBS thought it may be appropriate to include her in the children's barred list. The Minded-to-Bar letter enclosed other information that the DBS held. The letter invited the appellant's representations as to why the DBS should not include her in the list. The appellant's solicitors, Pickup & Scott, made representations in response by letter dated 18 March 2022. We have reproduced that letter in the evidence section below.

(3) Final Decision letter

17. The DBS then sent to the appellant the Final Decision letter dated 6 April 2022. The letter explained that the DBS had decided that it was appropriate and proportionate to include her in the children's barred list.

18. The Final Decision letter went on to explain why (pages 145 to 147)—

> "**How we reached this decision**
> We are satisfied that you meet the criteria for regulated activity because you have worked as a Support worker with […] Recruitment.
>
> We have reviewed all the information we hold and are satisfied of the following:
>
> - On 26/08/2020 you have assaulted CHILD by swinging your arms at him and hitting his upper body, chest and shoulders. You have also threatened further violence saying 'if he hits me I'll hit him back I'm not scared of him' (Flags 2, 5, 6, 7 and 8).
>
> The DBS is satisfied you have engaged in conduct which harmed or could harm children.
>
> This is because it has been established that you have behaved inappropriately towards a child as when CHILD spat water at you, it has been determined that you were unable to control your emotions and have responded to this by hitting him on his upper body, chest and shoulders. You have also threatened further violence saying if he hit you, you would hit him back. It is considered that after the incident you were angry and so it is considered possible that you were angry before this at the time of the incident and that this was potentially a contributory factor to your behaviour. It is unknown if this incident has caused harm, although CHILD had marks on him after the incident we are unable to say if this is what caused the marks or not but it is considered that your behaviour could cause harm.
>
> It is noted that there have not been any previous concerns about your behaviour suggesting that you have behaved appropriately previously, although you were only in your role as a support worker for a few months. It has also been established that at the time of the incident you admitted assaulting CHILD but then have subsequently denied touching him in your police interview suggesting you have changed your account. It is acknowledged that in your representations from your solicitors you have continued to deny assaulting CHILD or saying if he

hit you, you would hit him. You also denied that you had admittined [sic] assaulting him, however we have information that is considered credible that you did admit assaulting him and there was a witness who saw you do this and say that you would hit him if he hit you, there is no information in your representations that has challeneged [sic] the credibility of this information and so it is still considered credible. It was also suggested in your representations that you were assualted [sic] by CHILD and when [AD] came in he continued making contact with you, however we have no other infomration [sic] to be able to confirm this only that you were seen to assault him. Your solicitors have also suggested that you did not receive Team Teach training or training or information about restraints but there is information that REDACTED requested that all agency staff had some sort of restraint training and so it is considered likely that you would have had some training in this area but even if you had not this would not justify assaulting a child.

In your representations you [sic] solicitors said apparently another carer intervened in the incident but refused to give a statement to the police and they suggested that if you had been in the wrong they had no doubt the person would have made a statement against you, there is though nothing to support this, there could be a number of reasons why someone would not be willing to make a statement to the police and the fact they did not would not be considered evidence that the incident did not occur. It has been established that you have not considered the harm your behaviour could cause, you were unable to control your emotions when you have behaved in the way you have and there is no evidence that you have taken action to address your behaviour so it is considered you could repeat your behaviour in future if you were in a similar situation. If you were unable to control your emotions then you could react in a violent manner which could cause harm.

It is acknowledged that if you were to be barred on the Children's List then this would restrict your opportunities to work/volunteer with children where you have worked as a support worker, thus this would affect your Article 8 rights and potentially your future earnings. However as it has been established that you have been unable to control your emotions as when CHILD has spat water at you rather than moving away of [sic] de-escalating the situation, you have reacted by hitting him. It is unknown if any harm was caused by your behaviour but it is considered that your behaviour could cause harm.

It is acknowledged that there have not been any previous concerns about your behaviour suggesting that you have behaved appropriately previously, although you were only in your role as a support worker for a few months. After admiiting [sic] to hitting CHILD at the time of the incident you have then subsequently denied touching him in your police interview and have continued to deny your behaviour in your representations. It is considered that you were unable to control your emotions when you have behaved in the way you have and so it is considered you could repeat your behaviour in future if you were in a similar situation. Due to the seriousness of the safeguarding concerns and the possibility of the behaviour being repeated in future and [sic] it is not considered that there are sufficient safeguarding measures in place then a barring decision on the Children's List is considered a necessary and proportionate safeguarding measure.

As a result, we included your name in the Children's Barred List using our barring powers as defined in Schedule 3, paragraph 3 of the Safeguarding Vulnerable Groups Act 2006 (SVGA) on 31/03/2022.".

(4) Permission to appeal application

19. By a completed UT10 form dated 5 July 2022, the appellant applied for permission to appeal against the DBS's decision communicated in the 6 April 2022 Final Decision letter. The deadline for making the permission application was 6 July 2022 (rule 21(3)(a)). Although the Upper Tribunal's 3 August 2022 acknowledgement letter told the appellant that her UT10 form had been received on 3 August 2022, the letter was mistaken on that. The completed UT10 form had in fact been received by the Upper Tribunal almost a month earlier, on 6 July 2022, as we have seen on the Upper Tribunal's computer case management system. The permission application was therefore in time.

20. On 1 August 2023, Upper Tribunal Judge Hemingway gave permission to appeal to the Upper Tribunal. He did so on the following grounds (page 186)—

> "5. … On the other hand, the incident appears to have been a fast moving one with the possibility of accounts and recollections becoming confused. I cannot find, in the material before me, a first-hand account of events from AD. Whilst it is said of the child that he has no reason to lie, he was aged only 12 at the time, he does have health issues which may impact upon the accuracy of his evidence, and the accounts of what he said to the appellant might point to a strong dislike of her. There has been no prosecution. The evidence does not necessarily seem to tie the injuries to the incident. The appellant's account of events has not been tested and found wanting at an event such as a full disciplinary hearing.
>
> 6. The threshold for the giving of permission is not an overly demanding one (see above). Bearing that in mind, I consider the DBS may have made a mistake of fact in its finding that the appellant assaulted the child and in its related finding that she threatened to do so again by indicating if he were to hit her, she would hit him back. I also give permission (though this was not expressly sought) on the basis that, even absent a mistake as to fact, the outcome may have been disproportionate bearing in mind there was only a single incident of concern, there may have been a lack of appropriate training provided to the appellant so as to equip her with the skills to deal with aggression displayed towards her, she may have been provoked (there seems to be little doubt she was subjected to appalling verbal abuse at some point during the incident) and her employment opportunities will be limited by her inclusion in the CBL.".

(5) Grounds of appeal

21. So, there were three grounds on which permission to appeal was granted—

(1) arguable mistake of fact as to the appellant having assaulted the child;

(2) arguable mistake of fact as to the related finding that she threatened to hit him again by indicating that, if he were to hit her, she would hit him back; and

(3) in any event, proportionality.

22. On 28 February 2024, we heard the appeal, in person in Birmingham. The appellant was unrepresented. The DBS was represented by Mr Ashley Serr of counsel. We thank the appellant and Mr Serr for their contributions.

(6) The evidence

23. We turn next to describe what evidence was before the tribunal and what evidence was missing.

(a) The appellant's own contemporaneous account was missing

24. It appeared to be common ground that, while still at the home after the incident, the appellant had completed a handwritten report about it, in the period from approximately 20.30 to 21.50. It was at 21.50 that she walked up the driveway to wait for her taxi. It was also common ground that the DBS has not seen that report, and that the appellant has never seen it since handing it over to one of the home staff just before leaving the home on the evening of the incident. A letter dated 30 June 2021 from Northamptonshire Police made no mention of the police having seen it either. And the appellant thought her employment agency had not seen it. The written account was not before the Upper Tribunal. The police letter said that the appellant had "*said she had written a statement before she left the home and one for the agency she worked through*". But no written statement at all by the appellant was before the tribunal, whether written for the home or for her employment agency. Moreover, it was not suggested to us that there was more than one contemporaneous written statement by the appellant.

25. However, the 30 June 2021 letter from Northamptonshire Police said of the appellant's written account (although the source is not stated), among things, that "*She wrote that she defended herself and swung at the child*" (page 63, second paragraph).

(b) Documentary evidence

26. In addition to what was included with the appellant's UT10 form and grounds of appeal, there was the following documentary evidence—

	Document	**Document date** (in date order)
(1)	Serious Incident Report completed by DJ and initialled by AD, DJ and PR, dated the same day as the incident (pages 52 to 58)	26 August 2020
(2)	"Designated Officer (formerly LADO) referral form for Professionals" completed by Acting Assistant Team Manager, BD, dated the day after the incident (pages 31 to 34)	27 August 2020
(3)	Manuscript notes (not a transcript) of the appellant's voluntary police interview of 7 December 2020 (pages 130 to 134)	7 December 2020
(4)	Record of LADO JEM meeting which took place on 3 March 2021 (pages 106 to 110)	15 March 2021 (recording the 3 March 2021 meeting)
(5)	Referral form by TW of the appellant's employment agency (pages 28 to 30)	22 March 2021

(6)	Undated note of "Debrief meeting" between TM (of the home) and DJ (staff member witness who completed the Serious Incident Report) (pages 60 and 61)	Undated
(7)	Emails between TW of the appellant's employment agency and TM of the home (pages 38 to 41)	10, 11 and 16 June 2021
(8)	Northamptonshire Police letter to the DBS (pages 62 to 65)	30 June 2021
(9)	Letter from the appellant's solicitors (at that time) Pickup & Scott Solicitors (containing submissions and evidence) (pages 135 to 139)	18 March 2022
(10)	Barring Decision Summary (pages 150 to 169)	Undated
(11)	Appellant's training record verified by employment agency, undated (but pre-June 2023) (page 195)	Undated
(12)	Printed training materials handed in by the appellant at the hearing (76 pages; these will be added as pages 196 onwards)	Undated
(13)	Electronic training materials in the appellant's smartphone, which she adduced at the hearing	Undated

27. We describe in turn each of those documents:

(i) Serious Incident Report dated 26 August 2020 (day of incident)

28. The Serious Incident Report was dated in two places 26 August 2020 (the date of the incident). It said it had been completed by DJ (the staff member who had come out of another room after AD had allegedly seen the appellant's arms "connecting" with L). The Serious Incident Report listed as staff present: the appellant, AD, DJ and PR. The report bore initials next to each of those names except the appellant's (page 52). The Serious Incident Report said (page 54)—

> "**ANTECEDENTS:**
>
> [L] had returned from a cinema trip with staff at 20.05. [L] sat in the office with staff chatting about the film he had been to see. [L] was then offered his medication which was administered by AD and PR. DJ went into the kitchen to microwave her dinner and went into the dining room. At 20.24 staff received a call to pick up another young person so PR left in the pool car. [L] was now sitting in the reception area with staff [the appellant] (Agency staff) watching videos on his phone.
>
> **BEHAVIOUR:**
>
> AD was in the office stock checking the medication and heard shouting from the reception area from [L] and [the appellant] (Agency staff). AD went immediately out into the reception area. [L] was standing near the front window of the reception area near the radiator and [the appellant] was standing in front of [L]. AD saw [the appellant] swinging her arms in an over arm motion in the direction of [L] connecting with his body (chest and shoulders)

DJ hearing the shouting immediately came out of the dining room and straight into the reception asking what was going on, unaware that PR had left the building to pick up young person SG.

[L] was shouting at the top of his voice and was standing in front of the chair near the radiator by the snug window, his t shirt soaking wet. [L] was raging, puffing up his chest and clenching his fists calling [the appellant] a fucking cunt and black bitch. [The appellant] was standing not too far away from [L]. [L]'s drinks bottle was lying empty on the carpet by [L]'s feet.

AD was trying to calm [L] down. DJ stood between [L] and [the appellant] asking [L] to calm down and tell her what was wrong. [L] said "that fat bitch has thrown water all over me and I'm going to punch her right in her fucking face the bastard" [L] was trying to get to [the appellant] by trying to barge past DJ, his fists were clenched and face was red with rage. AD and DJ asked [L] several times to calm down but he continued to try and get to [the appellant].

[The appellant] stood behind DJ, she said something that DJ couldn't quite make out but AD heard [the appellant] say "if he hits me I'll hit him back I'm not scared of him" AD guided [L] away with a half shield to his room. DJ followed and asked [L] again to calm down. He immediately went back into reception, calling [the appellant] a Black Cunt and that he was going to punch her.

[L] opened the front door and started to walk up the drive. AD offered to go for a walk with [L] to help him calm down which he refused and also refused the offer of a dry t shirt instead taking off his soaking wet one throwing it on the floor.

[L] started pacing around the drive. [L] picked something up, like a small stone, off the drive and threw it through the open door where [the appellant] was standing. [The appellant] then closed the front door and sat on the sofa in the reception area.

[L] then started to kick the front door continuing to threaten and swear at [the appellant] calling her a fucking fat black bitch and black cunt who he was going to "get" He asked if the car in the drive was [the appellant's] as he was going to destroy it. DJ told [L] no it was hers.

[L] went to the side window and was punching it with some force. He then made a racial slur towards [the appellant] calling her a Fucking Nigger. DJ told [L] to stop it as he could be arrested by saying the N word. [L] said he didn't care. DJ asked AD to ask [the appellant] to leave as it wasn't helping that [the appellant] was sitting by the window in reception just staring out at us whilst we were trying to deal with [L].

AD went into the house and asked [the appellant] to go into the sleeping in room with a pad and pen and write down what had happened. DJ stayed outside with [L] who then facetimed his mum on his mobile. [L] told his mum that a member of staff had hit him and that he could call the police and get her sacked.

[L] then pointed to the upper left side of his chest area. He ended the call and was starting to calm down. DJ asked [L] what happened, he said that he had some water in his mouth and laughed so it came spurting out in the direction of [the appellant]. [L] also stated that [the appellant] had pushed him into the radiator.

Approx. 20.40 Staff PR arrived back in the pool car with young person SG and AD came back out to the front of the drive. [L] asked if he could go into the back

garden to kick a ball about. AD went through the house and opened the back gate. [L], SG and PR went into the back garden.

DJ then rang BD (the on call manager) at 20.43 to inform him of the situation. BD said he would come straight in. After several minutes [L] came back in the house, he was offered medical attention for his hand in case he had injured it by punching the windows. He declined and turned to go to his room DJ noticed a mark on his back.

DJ along with AD went to [L]'s] room and asked they [sic] could check him over. There was a strange semi-circular mark just below his left shoulder blade area and a red scratch mark on his left upper arm area. [L] said that there was a mark on the front upper left chest area but staff couldn't see it. DJ asked [L] if he would give permission to take photos of the marks and he agreed.

CONSEQUENCES:

[L] then got his drinks bottle, sat in reception with DJ. [L] asked where [the appellant] was. DJ told [L] that she had gone home and that the on call BD was on his way in and [L] could explain to BD what had happened and if he wanted make [sic] a complaint.

[L] said that he hadn't seen [the appellant] leave, DJ replied it was when [L] was in the garden. [L] was calm at this point took his refilled drinks bottle and went to his room. BD arrived at approx. 21.20 He checked on [L] and was given a full account of what happened by AD and DJ.

BD then went into the sleeping in room where [the appellant] was and asked her for her account of what had happened. AD rang [L]'s mum to inform her of what had occurred and injuries noted.

At approx. 21.50 [the appellant] walked up to the top of the drive waiting for a lift home DJ stood at the top of the drive with her until her lift arrived.

Highlight any significant comments made during the Incident:

[The appellant] was heard saying "if he hits me I'll hit him back I'm not scared of him"
[L] told DJ [the appellant] had pushed him into the radiator.
[L] told AD that [the appellant] had thrown his water bottle at him.".

(ii) "Designated Officer (formerly LADO) referral form for Professionals"

29. The "Designated Officer (formerly LADO) referral form for Professionals" was completed by Acting Assistant Team Manager, BD, the day after the incident.

30. The form said (pages 31 to 34)—

"**Description of allegation and source of information Context Witnesses**	[AD] was in the office stock checking the medication and heard shouting from the reception area from [L] and [the appellant]. [AD] went immediately out into the reception area. [AD] saw [the appellant] (Agency Staff) swinging her arms in the direction of [L] and connecting with his upper body chest and shoulders witnessed by [AD] this lasted a few seconds [L] was standing near the front reception window. [The appellant] was just in front of [L].

	[AD] stood in-between [the appellant] and [L] [The appellant] appeared angry by her facial expression she said "if he hits me I'll hit him back I'm not scared of him". [L] was backing away and shouting "you fucking bitch you hit me" [DJ] came out of the dining room and straight into the reception asking what was going on. [L] was shouting [the appellant] has soaked me. [The appellant] shouted [L] has wet my clothes. [L] was raging clenching his fists and red in the face making verbal and physical threats to [the appellant] saying "I am going to punch you in the face, I am going to hit you like you hit me, look what you have done to me you fucking bitch", [L] asked [AD] to let him past so he could punch [the appellant] he then said to [AD] If you don't let me past I will punch you in the face as well. [L] was removed from the area by [AD] to his bedroom and asked him to calm down. [L] then immediately went back into the reception area issuing threats again towards [the appellant]. [L] then opened the front door followed by [AD] and [DJ] and started to walk up the drive. [AD] offered to go for a walk with [L] to help him calm down [L] refused pacing around the drive. [L] picked something up off the drive and threw it through the open door where [the appellant] was standing. [AD] then closed the door, [L] started to kick the front door issuing threats to [the appellant], he then went to the side window [this does not say of a car] punching it several times and calling [sic] a fat black bitch and black cunt. [L] then started using a racial slur towards [the appellant] (Nigger) Staff told [L] he could be arrested for using the N word. [L] then took off his t shirt which was soaking and threw it on the ground. He asked if the car in the drive was [the appellant's] as he was going to destroy it. [DJ] told [L] no it was hers. Both [AD] and [DJ] were trying to diffuse [sic] the situation and [DJ] asked [AD] to go and ask [the appellant] to leave. [AD] went into the reception and asked [the appellant] to go into the sleeping in room with a pad and pen and write down what had happened. [L] then face timed his mum saying a staff member had hit him and he could call the police and get her sacked. [L] then showed his mum his left upper chest area. [L] then calmed down And asked to go into the back garden to kick a football about. [L] was given reassurance and support throughout. [L] was advised he could put a complaint in and was informed [BD] on call was on his way to see him; [L] said good.
Date of alleged incident	26th August 2020
Date concern raised	27th August 2020
Any action undertaken prior to notification? (suspension/witness statements taken/police notification. Etc)	I received a telephone call from [the residential home]. [DJ] informed me that [L] has just been hit by one of our agency staff [the appellant]. [DJ] informed I [sic] that [the appellant] was in the sleeping in room as she was requested to do a statement of events and remained there as [L] was not happy and was looking for her. When I arrived at [home] I went into the office and given [sic] a

	handover from staff members [DJ] & [AD]. I then went into the sleeping in room where [the appellant] was. I noticed there was a notepad and pen on the locker which was blank. I asked [the appellant] how she was [the appellant] was quite angry informing me that [L] spat water over her and she was not happy. [The appellant] took my hand and insisted I felt her top which was soaking wet as she stated. I refused to feel [her] top informing her I can see it was wet. I asked [the appellant] if she could write an account of events regarding what happened this evening. [The appellant] informed me "I hit him he was spitting water at me" I asked [the appellant] if she could record the events on the piece of paper provided as I felt it was best if she recorded this rather than telling me. I then left the room leaving [the appellant] to do her report. I returned a short time later and [the appellant] gave me her report and requested to continue working. I informed [the appellant] that an allegation was made against her this evening and I need to ask her to leave [the home]. I asked [the appellant] did she have a way to return home; [the appellant] informed me she would call a taxi. I then walked out and [sic] [the home] with [the appellant]. [The appellant] gave me a record of her account in writing. On our way out [the appellant] went to speak with staff member [PR] I intervened requested both parties not to speak with each other; then we continued to walk out of [the home]. While [the appellant] Was [sic] waiting for her taxi at the top of the drive of [the home] I reassured [the appellant] that the process that I am carrying out now is in her best interest and the interest of the young person involved. [The appellant] Asked [sic] me if I would be contacting her agency I informed her I would and also informed her I would be contacting the police and senior management of social services. [The appellant] got picked up by a taxi from [the home]. 26th August 2020 @ 22:05hrs Telephone call to the police to inform them of the above incident. Incident number 604-26/8/2020 27th August 2020 – Police arrived at [the home] And [sic] took a statement from staff member [AD] and young person [L]. The Police requested details of [the appellant] as well as her address. This information was shared with the police as requested.".

(iii) Manuscript notes of the appellant's voluntary police interview

31. The manuscript notes (not a transcript) of the appellant's voluntary police interview of 7 December 2020 said (pages 130 to 134)—

"Offences investigated:
ASSAULT

[…]
Pre interview risk assessment 26 August 2020
1/D [redacted]
on that day, on shift with 3 x staff.
Shift end 3pm. Asked to work later agreed.
Child taken to McDonalds.
Splashing water from ~~mouth~~ water bottle on my body.
Told him to move away from me.
He went outside. I let him back in.
Seeking attention.
Spraying me from water bottle. I took bottle of him.
He punched me in chest, kicking. Staff restrained.
'called black goat / bitch'
He went to his room. Manager asked me what happened.
I stayed in office until end of shift.
He assaulted me. Never touched him. Know his behaviour. Wouldn't want to hurt him – repercussions, wouldn't ruin my career. Just wanted to support him.
Q Holding bottle?
With two hands. So I took it, one hand. He punched me in the chest.
I screamed. Staff came to me.
Q Swinging your arms?
cant remember. Deny.
He was trying to fight me – kicked + punched. Staff inbetween us.
Q Assault child?
No he assaulted me.
Q Manager report – hit him?
Deny. Didnt say that.
Q Write statement?
Yes before I left that day sent to agency also.
Q copy?
No.
Child injury marks.
Deny causing injury. Dont know how caused. Never touched child.
Q Want to pursue complaint?
No, he's vulnerable lad, special as in care.
Worked 5 – 7 shifts with child. Worked there before he arrived. I helped arrange his toys
He doesn't have a relationship with anyone. We take him out to make him happy. Engage in activities.
2:1 care.
At time just me + him in living area.
Q Why child make allegation?
Only black girl – 'fuck off black bitch.'
He's a special kid, he vulnerable.
Colleagues make me feel very welcome. Don't take personally.

Post interview assessment

Feel very sad. Child just a vulnerable child. Never done anything wrong. Why like that towards me.

Worried – Police come to office – he assaulted me.

Wanted to be social worker.".

(iv) Record of LADO JEM meeting which took place 3 March 2021

32. The Record of the LADO Joint Evaluation Meeting ("the JEM meeting") which took place on 3 March 2021 recorded (pages 107 to 109, our emphasis)—

"Outline of Allegation / Concern:

A member of staff at [the home] [AD] has reported that, whilst in the office stock checking, she heard shouting in the reception area from (young person) and [the appellant] (Agency Support Worker). [AD] immediately went to the reception area and found [the appellant] swinging her arms in the direction of CHILD and connecting with his upper body, chest and shoulders. This lasted a few seconds. [AD] stood in-between [the appellant] and CHILD

[The appellant] appeared angry by her facial expression and said: "If he hits me, I'll hit him back. I'm not scared of him". CHILD was backing away and shouting: "You fucking bitch. You hit me". When asked what was going on, CHILD said that [the appellant] had soaked him and [the appellant] shouted that CHILD had wet her clothes.

CHILD was raging with clenched fists and was red in the face. He made verbal and physical threats to [the appellant] saying: "I'm going to punch you in the face. I'm going to hit you like you hit me. Look what you have done to me you fucking bitch". CHILD asked [AD] to let him past so he could punch [the appellant], then said: "If you don't let me past, I will punch you in the face as well". CHILD was removed from the area by [AD] to his bedroom and she asked him to calm down. CHILD then immediately went back into the reception area issuing threats again towards [the appellant]. He then opened the front door, followed by [AD] and another staff member, and started to walk up the drive. [AD] offered to go for a walk with CHILD to help him calm down, but CHILD refused, pacing around the drive. CHILD picked something up off the drive and threw it through the open door where [the appellant] was standing. [AD] then closed the door. CHILD started to kick the front door issuing threats to [the appellant] then went to the side window punching it several times and calling her a "fat black bitch" and "black cunt".

CHILD then started using a racial slur towards [the appellant] (Nigger). Staff told CHILD he could be arrested for using the N word.

CHILD then took off his t-shirt which was soaking and threw it on the ground. He asked if the car in the drive was [the appellant's] as he was going to destroy it. He was told that it wasn't. Both [AD] and the other staff member were trying to diffuse [sic] the situation and [the appellant] was asked to go into the sleeping in room with a pad and pen and write down what had happened.

CHILD then face timed his mum saying a staff member had hit him and he could call the police and get her sacked. CHILD then showed his mum his left upper chest area. CHILD then calmed down and asked to go into the back garden to kick a football about.

Meeting Discussion:
Background Information:

[The appellant] is an agency worker for [the employment agency]. Whilst working at [redacted] she got into a fracas with young person, which led to shoving and physical handling. It is alleged that during this, [the appellant] forcibly struck CHILD in the chest and some injuries to prove this were noticed afterwards.

[The appellant] is no longer working for NCC and has been suspended from [the employment agency] whilst investigations take place. A representative from [the employment agency] was unable to attend today's meeting and they will be fed back to following today's meeting.

Information from [the home]:

[TM] (Team Manager) relayed that [the appellant] has passed all NCC recruitment criteria and has a clear DBS. With regards to her employment history, she was an office worker between 2015 and 2019, before becoming a support worker in March 2020. She joined [the employment agency] in July 2020 and approached the agency for help due to having shortages in the team. The incident in question took place on 26th August 2020 and there have been no other concerns with [the appellant's] practice aside from this.

The report from the member of staff who witnessed the incident is that they saw [the appellant] swing her arms and connect with CHILD chest area so they intervened. When questioned, [the appellant] admitted to hitting him and said she did this as he spat water at her. With regards to injuries, [L] had red marks on his upper body and chest. [TM] confirmed that it was not done as part of a restraint.

CHILD is a difficult young person with lots of behavioural concerns. He was originally placed at [redacted] for five days as a stepping stone placement, but remained there for thirty-nine days as his new placement fell through. He left on 18th September 2020. CHILD presents lots of verbal and physical aggression and causes damage to property. He has been diagnosed with ADHD, ASD and Oppositional Defiance [sic] Disorder. With regards to managing behaviour, staff would usually look to verbally deescalate [sic] if possible. [TM] stated that, from looking at the report of the incident, if CHILD was spitting water, there would've been plenty of opportunities for [the appellant] to remove herself from the situation and seek additional support from staff, which would've been the expectation. If staff are concerned about safety, they can use physical intervention, but [the appellant] did not attempt to do this in this situation, nor was it deemed necessary. As such, even if [the appellant] has not committed a criminal offence, it is poor practice. It is also concerning that, when questioned, [the appellant] said: "I hit him because he spat water at me".

[The appellant] has not received Team Teach training, but all agency staff are requested to have undertaken some form of restraint training.

Information from Police:
DC Annmarie Brown confirmed that CHILD had red marks on his chest area and his back which were indicative of a struggle. It is difficult to say if they were caused by him being struck, but it is clear that some sort of struggle / fight had taken place. A member of staff had said that they intervened when they heard the struggle taking place and stood between [the appellant] and CHILD, although Police have not been able to get a statement.

[…]

Outcome Discussion:
The DO outlined that the Police investigation and [the appellant]'s statement is clear that there has been an incident during which [the appellant] struck out at [L] causing injuries.".

(v) Referral form by TW of the appellant's employment agency

33. The referral form dated 22 March 2021 was completed by TW, Compliance Manager at the appellant's employment agency. The completed form included (page 29)—

"Summary of the circumstances that has [sic] resulted in this referral	[The appellant] was seen swinging her arms in the direction of a young person and connecting with his upper body, chest and shoulders. [The appellant] appeared angry and said 'if he hits me i'll hit him back i'm not scared'.
[…]	[…]
Information as to whether the referred person has accepted responsibility or admitted the conduct or any part of it, provided any explanation or shown any remorse or insight.	No she hasn't"

(vi) Undated Debrief meeting between TM (of the home) and DJ (staff member witness who completed Serious Incident Report)

34. This undated note recorded a "debrief" meeting between the agency and TM, the manager from the home (pages 60 and 61). The note recorded that DJ told TM that AD had told DJ, during the incident, that AD "*had witness [sic] agency worker [the appellant] swinging her arms at [L] (over arm, front crawl style) connecting with various parts of [L], body*". The document says nothing about what [L] said except that he was "*verbalising his intention*" to assault the appellant (page 60).

(vii) Emails between TW of the appellant's employment agency and TM of the home

35. Emails dated 10, 11 and 16 June 2021 passed between TW of the appellant's employment agency and TM of the home (pages 38 to 41). TW requested: a copy of the written statements made by the witnesses and victim, minutes from the disciplinary meeting and outcome, and any other information or evidence used as part of the investigation (email 10 June 2021). TW emailed TM the next day. She told him she had had the Lado referral letter and outcome letter but not the written statements from the witnesses and victim, nor the minutes from the disciplinary hearing meeting (email 11 June 2021 at 08.45). TM replied five days later on 16 June 2021 at 11.18. He said it was unlikely that the statements would be available from the police as no police action had ensued and that he did not believe the JEM minutes are shared by the Lado. TM enclosed with that email the completed "Designated Officer (formerly LADO) referral form for Professionals" and the Serious Incident Report.

(viii) Northamptonshire Police 30 June 2021 letter to DBS

36. The 30 June 2021 letter to the DBS from Northamptonshire Police said (pages 62 to 65, emphasis in original)—

> "Dear Anita
>
> **RE: [appellant's name, date of birth and address]**
>
> **Specific Offences:**
>
> - **Allegation of assault on child in referred individual's care on 26th August 2020 – no further action**
>
> I write to you in acknowledgement of your letter for further information dated 28th June 2021 regarding the above named individual.
>
> On 26th August 2020, [the appellant] was working as a Carer at a children's home. [The appellant] was in a communal area with a 12 year old male child. The child stated he had been drinking some water and [the appellant] made him laugh which caused the water to squirt out of his mouth and resulted in [the appellant] getting wet.
>
> The child stated [the appellant] began to slap him numerous times causing slight redness to the skin. When officers arrived, there was no sign of any injuries.
>
> The child also stated [the appellant] pushed him into a radiator and threw the child's water bottle at him.
>
> Another Carer heard the commotion from the room where she was working and say [sic] [the appellant] hitting the child. The Carer intervened in the altercation and escorted the child to his room.
>
> She told [the appellant] to write her account of what had occurred. [The appellant] stated that the child spat water at her and when challenged on his behaviour, he began punching her to the stomach. She wrote that she defended herself and swung at the child.
>
> The Carer stated [the appellant] appeared angry and said "if he hit's [sic] me, I'll hit him back, I am not scared of him". The child was backing away and shouting "you f***ing bitch, you hit me". The child shouted [the appellant] had soaked him and [the appellant] shouted that the child had wet her clothes.
>
> The child was described as raging with clenched fists and a red face making verbal and physical threats to [the appellant]. He made various racial slurs to [the appellant].
>
> When a Senior Staff member arrived at the home after being called in to help deal with the incident [the appellant] stated "I hit him, he was spitting water at me". After [the appellant] had given a written account, she asked to be able to continue her shift but was told she needed to leave.
>
> The child stated he didn't want to go to Court and was happy for staff at the children's home to deal with the matter internally.

The other staff member [this appears to be DJ] who intervened in the altercation did not want to provide a statement to police or attend Court.

However, whilst it was noted the children's home would investigate the matter internally, the police concluded due to the nature of the incident that there was a duty of care to the child for the matter to be investigated by officers.

A LADO (Local Authority Designated Officer) referral was made on the 9th September 2020.

[The appellant] was voluntary [sic] interviewed on the 7th December 2020. She stated she along with other staff members had taken the child to McDonalds and on returning the child had started to splash her with a water bottle to her body area. She asked him to move away so he went outside then she let him back in. She stated the child often sought attention and sprayed her with water so she took the bottle off of [sic] him. As she did so, he punched her to the chest and called her a racist name.

She stated the child was punching and kicking out at her and that other staff had stood in between them. She stated the child assaulted her but she never touched him. [The appellant] stated she was fully aware of his behaviour and wouldn't hurt him or ruin her career as she just wanted to support him.

She described the child holding the bottle with two hands and as she removed it with one of her hands, he punched her, she screamed and that was when staff came to assist. When asked by the interviewing officer if she had swung her arms she stated she couldn't remember but said he was trying to fight her.

[The appellant] denied assaulting the child. The interviewing officer asked her if she had made the comment to the children's home manager that "I hit him, he was spitting water at me". She stated she had written a statement before she left the home and one for the agency she worked through. She had not been given a copy of the first account she had provided at the children's home.

When [the appellant] was shown photograph's [sic] of the child's injuries, she stated she did not know how these were caused as she did not touch him.

[The appellant] was asked if she wanted to make a complaint against the child but she stated no as he was a vulnerable [sic] and special as he was in care. She had worked with him previously. She stated he did not have any relationships with anyone so staff would take him out to make him happy and engage him in activities. He was normally 2-1 staff but when this incident occurred, there was [sic] only [the appellant] and the child present. She stated she was the only black member of staff and he would often tell to [sic] "f*** off black bitch". She stated she would never take this personally.

In February 2021, the child again confirmed he did not wish to pursue this matter. He stated he had "forgotten" about the incident. His mother was also in agreement with this decision.

A Joint Evaluation Meeting was held on the 3rd March 2021. The meeting concluded the incident was substantiated. Full details can be obtained via LADO. The email address is LADOReferral@nctrust.co.uk

As the child and his mother were not interested in supporting a prosecution and [the appellant] denied the allegations, no further action was taken by police. It was felt it would be difficult to evidence that there was an intentional assault on

the child by [the appellant]. The other Carer who intervened had also refused to make a statement and despite being contacted several times by officers, had not made contact.

No formal statements were taken but I have attached a copy of the Tape Recorded Interview of [the appellant].

This information has been shared for Barring purposes only and not for any other purpose. Any need for sharing with the 'Referred Individual' should be compliant with the Data Protection Act 2018. Some shared Police information may have been deemed as relevant for risk considerations for Barring, however [sic] is not something we would consider sharing with the 'Referred Individual'. If sharing is deemed necessary the risk assessment you make before sharing, should take into account that including all the detail may identify the source and place them at risk.

Any other Relevant Information

Not applicable at this time.

If you have any further questions, please do not hesitate to contact me on the above number provided.

Yours sincerely

[Redacted]

Disclosure and Barring Service Quality Assurance Officer".

(ix) Letter from the appellant's solicitors

37. The appellant's solicitors Pickup & Scott wrote to the DBS on 18 March 2022 in response to the Minded-to-Bar letter (pages 135 to 139, emphasis in original)—

"Dear Sir / Madam,

Re: Our client, [the appellant] – D.O.B. […]

We have been instructed by our aforementioned client in connection with your letter dated 8th February 2022.

Our client has instructed us to put forward representations, that she is not barred from working with children and / or adults.

We were instructed by [the appellant] in connection with a voluntary police interview at Northampton Police Station on 7th December 2020. Disclosure had been provided by the Officer in the case, relating to the alleged victim, [L], who was a resident at [the home] in […].

In connection with the allegation, our client instructed us that she had worked at the above children's home for at least two months on a part-time basis, this was prior to the incident on 26th August 2020. She instructed us that [L] had been looked after by our client in the past, in her role as a Support Worker. She explained that he was a troubled child with many issues, and on most occasions it was necessary to keep him engaged.

On 26th August 2020, [L] had returned with other members of staff at [the home] from McDonalds. Our client was in the reception area when she was seen by the young male, who was also in the reception area. Upon seeing our client, he began to spit water from his mouth in our client's direction, causing the water to connect with her jumper, and thereby wetting that jumper. He continued to do this despite our client telling him to stop.

Our client believed that he was doing this in order to attract her attention. He proceeded to refill the bottle he had been drinking from and then squirted water from the said bottle at our client. At this point, our client took the bottle from him, making sure she did not make contact with any part of his body. As soon as she did this the young male punched our client in the chest area, causing the bottle to fall to the ground. Our client screamed out in pain, it was at this point that another member of staff, [AD], came to the scene.

Despite [AD]'s presence, the young male continued to act aggressively towards our client, trying to kick at her and flailing his arms about, making contact with her. This was despite [AD] being present.

Our client was asked by [AD] to leave the reception area and to wait in the staff room, but our client could still hear the young male shouting that he was going to kill her. Throughout this incident, our client vividly recalls the male shouting racist abuse at her, using deplorable and criminal language, namely *"black bitch", "black monkey", "black cunt"*.

Despite his racist language, at no stage did our client rise to that provocation.

Our client never admitted that she had assaulted the young male. [AD] claims that she witnessed our client 'flailing her arms' about making contact with the young male's chest area, we would like to stress that she was not present during the start of the incident. **This is noted in the incident 194 report, entitled "Debrief Meeting"**.

In the debrief meeting, it was noted by Mr [TM] as follows:-

> "In hindsight, the position of staff could have improved – it seemed to him that DJ was eating at the time, AD (presumably […]) was in the office and PR was collecting another young person, and [L] was being monitored by agency worker [the appellant]."

In that report, he ([TM]) goes on to state "I cannot ignore that an agency staff member was alone at the time the incident occurred… this is something that could be highlighted".

In our assessment, this is a clear admission by the care home that their procedures were defective and the care towards agency staff was not given any consideration.

[AD] was not in a position to comment as to how or what occurred at the start of the incident. It was our client who was the victim of a sustained assault against her. Any "flailing of arms" by our client was in complete self-defence, which was explained in her interview conducted under caution on 7th December 2020.

We are extremely concerned to note, from the paperwork that has been supplied to us by our client (which was attached to your letter to her), the distressing events that unfolded on 26th August 2020. We refer to the fact that our client was being physically assaulted, threatened with violence, threatened

that her private property would be destroyed, and racially abused. No attempts were made by the care home to report the criminal behaviour of [L] to the Police. The care home's response was woefully inadequate.

Words such as "fucking nigger" were used by [L] in presence [sic] of other staff members, and although staff members told [L] that this was criminal behaviour, no actual steps were taken to report him to the Police. Whilst we appreciate that [L] is a young person, this would not have barred him from having been reported to the Police or for the Police taking criminal action against him for his racist, violent and threatening behaviour.

We further note that, not only was [L's] behaviour out of control towards our client, but also violence was threatened against [DJ], he said "*If you don't let me pass, I will punch you in the face as well*".

Our client instructs us that whilst she was standing in the doorway, [L] picked up a stone and threw it in her direction. Had our client not moved out of the way, that stone would have struck her. Again, there appears to have been inaction by the care home towards [L], despite his further acts of violence towards our client.

It goes without saying that our client does not accept that she admitted to any member of staff that she would "hit the boy if he hit her", and that "she was not scared of him". These words were never said by our client, in fact our client was scared and frightened by the boy's violent and uncontrolled behaviour.

We are concerned to note that although our client was asked to write down an account of what had happened, she was never shown nor given a copy of that account, despite requesting it on many occasions.

If her written account is available, we would like to see this. If it is not, we would like to know why not?

We are also concerned to note that at no stage was our client provided with any written and signed statements of any witnesses, including the alleged victim in this case.

It is disappointing to note that this incident took place in an area where there was no CCTV. Had there been CCTV, our client's account would have been further corroborated.

We would like to refer you to the copy of **the Serious Incident Report**, which specifically refers to [L's] behaviour, in that he was "*in a heightened state, physically and verbally threatening, and that staff felt he needed to be removed from the area for his and the staff' safety*". The same report confirms his use of sexist and racist language, that he was intimidating, both physically and verbally, and that he had threatened to damage property not belonging to him.

We have considered the JEM notes, following that meeting, it clearly states that "*If staff are concerned about safety, they can use physical intervention, but [the appellant] did not attempt to do this in this situation, nor was it deemed necessary*". The meeting makes it plainly clear that in a situation where staff were concerned about their safety that they could have deployed physical intervention, although this option was available to our client, our client did not at any stage attempt to do this, other than to defend herself, despite the fact that our client found herself in an extremely challenging situation.

We are concerned to note that [the home] did not make any effort to train our client or to explain any restraint skills, and would ask why no training was given to her. There is clear reference to the fact that Team Teach was something that our client was not trained in. The JEM meeting goes on to state that "*If she had attempted a restrain, she was not equipped to be able to do so*".

In connection with the alleged injuries to [L], it is far from clear as to how those injuries were caused. We note that this alleged victim suffered with ADHD, ASD and Oppositional Defiance [sic] Disorder. Any injuries caused to him were not as a result of anything that our client did.

In respect to the comments made by [BD] that our client "*openly admitted to hitting L*", as indicated above our client completely refutes that at any stage she admitted hitting [L]. The so called admission, does not appear to have been recorded in any way, such as through any mobile phone video footage or on CCTV.

A disciplinary meeting took place in our client's absence, it concluded that "*disproportionate force on a young person causing injury could have been handled much better*". We reiterate that the start of the incident was not witnessed by any other person, and the behaviour of the young male speaks for itself. This is a situation, as we have already mentioned, where our client was in fact the victim.

In respect to comments that our client "showed no empathy", and that she "did not realise the gravity of the situation", we do not accept this assertion. Our client was in a state of shock following the racial and physical abuse perpetrated against her, and threats of violence to her and to her property.

During the course of our client's Police interview, she provided a full and candid account. At no stage did she hide behind any "no comment" answers, despite her right to silence. Further, she did not rely upon any prepared statement. During the course of that interview, our client was extremely distraught and at the end of the interview a welfare check was conducted in respect to **her**.

You are aware that the conclusion of the Police investigation was no further action against our client. This must not be conflated with the fact that the young male failed to make an official complaint against our client. The Police have every power to pursue a criminal prosecution whether or not an alleged victim supports Police action. The Police are entitled to pursue a "victimless prosecution", and very often this is exactly what they do. The Police would have been acutely aware of the fact that the young person in this case was a vulnerable male in a care home, and therefore with or without his or his parent / guardian's consent, the Police could have pursued a criminal prosecution against our client. They did not do so, because there was no evidence in order to do so.

There is reference in the paperwork provided to another carer who apparently "intervened", but that this carer refused to make a statement to the Police, despite the Police attempting to contact the person on several occasions. Had our client been in the wrong, we have no doubt whatsoever that this person would have made a statement against our client.

Our client is a lady who arrived from Nigeria in 2019. She completed her Master's degree in Project Management and is a woman of good character, both in this country and in Nigeria. Our client being barred from working with children or young persons or young adults will have an adverse impact upon

her livelihood, her reputation, and we would respectfully argue that it would be in breach of her human rights.

To bar her would be utterly unjustifiable.

You have now been presented with the full facts in this case, and we have no doubt whatsoever that having considered our representations, you will agree that our client should not be barred.

We enclose a signed form of authority enabling us to make the representations on our client's behalf, and look forward to hearing from you as a matter of urgency, because this incident has been extremely shocking and upsetting to our client. It is compounded by the fact that our client is unable at the moment to pursue work that she enjoys and, despite what has been said about her, is efficient and skilled at.

Yours faithfully,

Pickup & Scott Solicitors".

(x) Barring Decision Summary

38. The Barring Decision Summary prepared by the DBS set out the evidence and how it had been taken into account (pages 150 to 169).

(xi) Appellant's training record verified by employment agency undated (but pre June 2023)

39. This document was on the agency's headed notepaper and said (page 195, emphasis in original)—

"Training record for [the appellant]

[Agency's name] have verified successful completion of the following courses directly from the training provider or have seen the original certificates relating to:

- Fire Safety
- First Aid
- Food Safety and Hygiene Advanced
- Health and Safety Advanced
- Level 2 People Movers Moving & Handling
- Medication Advanced
- Level 1 Mental Capacity Act & DOLS
- Reporting and Recording Advanced
- Risk Management and Safer Caring
- Safeguarding Adults Level 2
- Safeguarding Children Advanced

Training update due June 2023".

(xii) Printed training materials handed in by the appellant at the hearing

40. At the appeal hearing, the appellant handed in a 76-page printed document comprising training materials. Mr Serr for the DBS did not object to its admission. We agreed with the parties that Judge Perez would have it scanned and supplied electronically to both parties. Judge Perez has put that in train. The document's first page said—

> "Alderwood
> Living & Learning with Autism
>
> **PROACT-SCIPr-UK®**
>
> **Introduction and Foundation Course Workbook**
>
> **Developed for Alderwood LLA**"

41. This training document's fourth page said—

> "**PROACT-SCIPr-UK®**
>
> **Positive Range of Options to Avoid Crisis and use Therapy**
>
> **Strategies for Crisis Intervention and Prevention**"

42. The headings in this training document included—

- "Duty of Care";
- "BILD's Positive Behaviour Support Mission";
- "Whole Person Approach";
- "Risk Assessment";
- "Challenging Behaviour";
- a Behaviour Observation Chart for completion;
- a Positive Behaviour Chart for completion;
- "Escalators";
- "Preventative strategies";
- "Human Rights";
- "Mental Capacity Act";
- "Guidance for Restrictive Physical Interventions";
- "Behaviour Control vs. Behaviour Support";

- “Why be aware of physiological and emotional reactions?”;
- “Non-Verbal Techniques”;
- “Verbal Techniques”;
- “Reasons for Touch”;
- “OUR RIGHTS”;
- “Behaviour Guidelines Checklist; and
- a Physical Behaviour Plan for completion in respect of an individual being cared for.

43. The list of “*Useful References and Bibliography*” at the end of the training document contained 25 references. These were a mix of legislation, books and government guidance.

(xiii) Electronic training materials in the appellant’s smartphone, which she adduced at the hearing

44. The appellant also showed us, with Mr Serr’s agreement, training materials in her smartphone. We did not take a copy. They were detailed and showed training on behaviour management and de-escalation, among other things.

(c) Oral evidence

45. The appellant gave oral evidence at the appeal hearing, from about 10.30am to 1.30pm. This included questioning by the panel and cross-examination by the DBS’s counsel. The appellant reiterated her denial of having assaulted the child and even of having touched him at all. Her oral evidence included the following—

> “I can’t remember the date, but I remember the incident. My shift was meant to finish at three. Manager asked me to stay over for late shift until 11 o’clock. At that point [L] was taken out with the other staff. Around six or seven they came back. He was in the lounge area. He was trying to get my attention; I know he plays around. I didn’t give him attention. He went to the kitchen to fill water bottle. He came back and started filling mouth, squirting from mouth on to my body, maybe six or five times. I went to the garden but could still see him. Then he went to refill the bottle again. I came back from the lounge, he continued. I took the bottle from him – [shows us] – then he kicked me on my thigh, like so [shows us]. I screamed. We were not holding each other. He was just hitting me. The staff saw him hitting me ’cause when I screamed they came out, two of them, they saw him hitting and kicking me and they had to hold him. Before I screamed, was just me and him in the lounge area. Two ladies came, just one of them was holding him. [L] was just not, you know, they couldn’t hold him, he was still coming at me, calling me names saying will kill me. He went outside, he was just kicking the bins, the trash, throwing stones into the window, going to kill me, black bitch, all sorts of abusive words. Can’t really remember, but swearing words. So I was asked to go to the staff room and wait, ’cause maybe seeing me was triggering him. I was asked to go home”.

46. The appellant’s cross-examination by Mr Serr included the following—

> “Q – Did you ever see instructions re dealing with him in his care plan?
>
> A – I read some of his care plan.
>
> Q – You would need to familiarise yourself with that?
>
> A – Yes.

Q – He had ADHD, oppositional defiant disorder, ASD and anger issues. Main way was to try to calm him down talk him down, the general way?

Judge to Mr Serr – Do you mean in the care plan?

Q – Was it in the care plan?

A – No.

Q – Where was it agreed to verbally de-escalating?

A – It wasn't.

Q – You did not know about verbally de-escalating?

A – No.

Q – Really? Working in a care home with special needs children? Page 195 document says you had safeguarding children advanced?

A – Yes, but what I know then and know now. If I had had that knowledge, it would have been different.

Q – With someone like L, if he is exercised or angry or emotional then meeting that with a physical response would be like petrol on a fire, opposite effect?

A – Well yes, but I didn't know that.

Q – No physical fights or arguments with him from July until the incident?

A – No.

[…]

Q – So he comes back from the trip, three staff around at the time, he gets meds, administered by staff?

A – Yes.

Q – Then PR leaves about half eight and the other two staff have eaten and then in the office and at some point you are left alone with L, in what is called the reception area?

A – Lounge area. Yes, TV, children to relax.

Q – Can't see what's going on in the reception from the office can you?

A – No.

Q – So he is fooling around with the water bottle?

A – Yes.

Q – Putting water in his mouth and you telling him to stop?

A – [Answer unclear].

Q – You're telling him to stop?

A – Yes.

Q – And he is not stopping?

A – Yes.

Q – And you're telling him to stop 'cause he is spitting water at you?

A – Yes.

Q – Why don't you just walk away?

A – I did walk away. I was sitting, so I stood up where I was and moved away.

A – At some point I went out in the garden. When I came back in, he continued. I could not leave him 'cause I was the only person with him. Yes I stood up to get the water bottle from him.

Q – Before you grabbed the bottle from him, was he laughing?

A – He was angry.

Q – He wasn't being playful in spitting the water?

A – No.

[…]

Q – PR goes to collect child. [AD] is in the office stock checking. I don't know whether [DJ] was still in the office.

A – Don't know.

Q – AD says she heard shouting from both you and L. So whatever has happened has escalated. You told the tribunal that, when you took the water bottle from him, you told the tribunal he hit you.

A – He hit and kicked me.

Q – So what did you then do?

A – I move away.

Q – How – duck away or turn your back and walk out?

A – No didn't turn back. I was backing away.

Q – Didn't raise your hands at all to a child hitting you?

A – No.

Q – Confused why you didn't physically walk away and into another room.

A – The lounge is quite big so you won't be in his face. I didn't know what best to do at that point in time.

Q – One might understand lifting hands in a defence position but you say you were not even doing that.

A – I was just trying to move away, not [sic] point putting hands up.

Q – Did you say anything like calm down?

A – Yes.

Q – [AD] went immediately out and L was standing near radiator be [unclear].

[…]

Q – You agree standing pretty close to each other?

A – Yes.

Q – AD said you were swinging arms overarm connecting with his body – admittedly she comes in mid-way, but she has signed the Serious Incident Report to say this. It might be understandable that you hit out at him. But you say you kept your arms by your side.

A – I don't know how I could be swinging arms.

Q – If you were worried about him, would it not be better to move out of his way?

A – [Answer not heard properly].

Q – What did you think was gonna happen with you standing there?

A – I did not just stand there; I was moving around the lounge. Was a big lounge.

Q – She says you swung arms, you say never happened.

A – I can't say.

Q – The note says he was wet.

A – I was wet.

Q – So he was not wet?

A – From him spitting water on me.

Q – From when you grabbed the bottle?

A – Maybe.

Q – The bottled is then on the floor, you agree?

A – Eventually on the floor.

Q – All this anger from him, seems a lot of anger to be generated just from pulling a water bottle out of his hand.

Q – Was he really angry ’cause you hit him and not ’cause you took the water bottle from him?

A – No.

[…]

Judge – Did you say “*If he hits me, I’ll hit him*”?

A – No. When I screamed for help, I was saying “*he’s hitting me, hitting me, stop hitting me*”. I don’t know where that came from.

Mr Hutchinson panel member – In the structured judgment by the DBS – point 20 – requested that all agency staff had undertaken some of sort of training. Had you had any restraint training, or managing behaviour?

A – Had no restraint training, not to do with de-escalation.

Mr Hutchinson – So what’s your view of the DBS finding that is likely that you had training?

A – Well the police asked, and my lawyer asked this, but I was not trained in restraint, or in crisis handling. And if I was, I would have handled it better.

Mr Hutchinson – So that view is wrong?

A – Yes.

Judge – Any training in moving someone away from a situation?

A – No, just manual handling. No training in moving away from situation or orally de-escalating.

Mr Hutchinson – Would the home and agency be aware?

A – The home might think I have the training, because I was given that shift by the agency. But I didn’t. I did have training on care.

[…]

Q (Mr Serr again) – It might be said, I guess, that a lot of the post-Serious Incident report rehashed what had been said previously.

A – Well, there is my written statement that they did not provide.

Q (Mr Serr) – Yes, very important, but we don’t have it”.

47. As to the written statement the appellant had drafted immediately after the incident, she further explained in oral evidence—

> “I explained everything that happened even though no camera was there that would be my saving grace. I was there three months before [L] came. He came twice. They moved him then they brought him back. When I explained to the manager what happened [unclear]. Yes I did write on the paper, was A4. I wrote

almost to the end then signed it. Never seen it again. … They [the staff] didn't show me my statement. I called my agency to explain what happened and they said waiting for statement that I gave to the home, but they never gave it to them.".

48. The appellant addressed in oral evidence the alleged admission she had made to BD, the Acting Assistant Team Manager who had arrived on scene after the appellant and L had been separated. This was the appellant's oral evidence—

"Ms Jacoby panel member – Can you remember what you told [BD], what did he ask?

A – He asked me, and I told him like I have just said now, he gave me a pen and paper to write it down. I said touch me I am wet. He said don't touch but can see wet.

Ms Jacoby – And what was your relationship with [BD]?

A – Was ok – [explains something about children – unclear].

Ms Jacoby – Repeats question: Your relationship with him?

A – Ok.

Ms Jacoby – Anything that would cause him to say something that was not true?

A – Not sure. I worked with other children, even though I new to care, I am not a person that would want to cause harm or cause suffering to child. Since joining the house, I have had no problem with anyone. They made it feel safe for me to work and no discrimination whatsoever.

Judge – So can you think of any reason why he would make that up?

A – I rang him: "*Can I see my statement that I wrote in the room, where I said I hit him. 'Cause I didn't say that*". He said, "*not*".

Q – Why would he say that?

A – I don't know. May be my language. Maybe he didn't hear me real good. I am African. When I came here few years ago my English was not pure. I never said I hit him – only that he hit me. Maybe he misunderstood. He just listened, didn't probe".

49. The appellant also gave oral evidence about training that she has received since the incident—

"I have since had training. When I read the email I was not happy [about being referred because of a risk of harm]. I just want to persuade that, maybe I should not go about it like that, maybe I should go for a walk, but 'cause he was just a child I can't leave him. I understand that he is just a child and has needs, special".

(7) Submissions

50. Mr Serr's written submissions for the DBS as to the DBS's assault finding were as follows (pages 182 and 183)—

> "38. There is substantial evidence to support the allegations in the barring decision:
>
> 38.1 The serious incident report indicates that [AD] saw [the appellant] swing her arms in an over arm motion in the direction of the child connecting with his body (chest and shoulders) - p.115
>
> 38.2 The serious incident report also confirms that the child said he had been assaulted by [the appellant], that she had said if he hits me I'll hit him back I'm not scared of him - p.115-117.
>
> 38.3 The marks seen on his shoulder and arm as documented in the incident report corroborate what [AD] says she saw in term [sic] of the assault - p.116.
>
> 38.4 The debrief meeting note attached confirms that [AD] saw [the appellant] swinging her arms connecting with the child's body - p.121.
>
> 38.5 The referral by [BD] to LADO on 27/8/20 confirms the incident report contents. Further, and significantly he's told by [the appellant] that "I hit him he was spitting water at me" - p.94.
>
> 38.6 The JEM meeting of 3/3/21 clearly concludes the allegations are substantiated, [the appellant] has harmed a child and poses a risk to children - p.106.
>
> 38.7 The police summary of 30/6/21 confirms that the child says he was slapped by [the appellant], and pushed into a radiator. There is no obvious reason for him to lie. There is no history of problems specifically between the child and [the appellant] prior to this incident. [The appellant] confirmed she hit the child. She said if he's hit me I'll hit him back. It confirms that she told a member of staff that "I hit him" - p.124-125.
>
> 38.8 In interview 4 months later to the police [the appellant] did deny assaulting the child. There are no witnesses to support [the appellant's] account that she "never touched him". Her assertion that she "can't remember swinging her arms" and then denies it is inconsistent with all the evidence and improbable - p.129.".

51. Mr Serr made a further written submission dated 12 January 2024. It reminded the tribunal of the various evidence references and mentioned the recent Court of Appeal judgment in *Kihembo v DBS* [2023] EWCA Civ 1547.

52. Mr Serr made oral submissions in accordance with his written submissions, but updated to take account of the even more recent Court of Appeal judgment in *DBS v RI* [2024] EWCA Civ 95. Mr Serr invited us to find that there was no mistake of fact on either of the two findings. Mr Serr submitted that he did not know whether the police letter to the DBS was independent of the Serious Incident Report; he said the police letter may just repeat other reports. Mr Serr pointed to the third page of the Serious Incident Report as showing what AD had said she saw (pages 54 and 118). Mr Serr submitted that, on analysis, the tribunal may feel that the Serious Incident

Report is the key document, and may feel that the others repeat it. He submitted that, if the tribunal were to find that the appellant "*never assaulted him, ie. never struck him at all, I accept remove because the threat would not suffice. The key was the striking of the child*".

53. As to the finding that the appellant had said "*if he hits me I'll hit him back I'm not scared of him*", Mr Serr submitted that what the appellant had meant by this was a present tense narration of the past, that is, that she meant "*he hit me and I hit him back*". Mr Serr submitted that it would be a strange way of looking at it to construe it as referring only to the future.

54. Mr Serr invited the tribunal to find that the appellant did not simply stand there while blows were rained on her. That was, he argued, implausible. It would have been more credible, he submitted, if the appellant were to say "*Yes I defended myself, or was raising my arms*" and "*What AD saw was in fact that she saw me raising my arms to defend myself*".

55. Mr Serr accepted, in cross-examining the appellant, that "*it's quite clear that the staff in the office did not see the first part of the incident*".

C: Law

Legislation

56. The relevant legislation is in the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act"). Inclusion in the children's barred list is governed by section 2 of that act and Part 1 of Schedule 3 to the act. The basis for the decision in this case was relevant conduct. So paragraphs 3 and 4 of Schedule 3 to the 2006 Act are relevant.

57. Section 2 of the 2006 Act provides—

> "**2.—**(1) DBS must 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.".

58. Paragraphs 3 and 4 of Schedule 3 to the 2006 Act provide—

> "*Behaviour*
>
> 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 (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.".

59. Section 4 of the 2006 Act governs appeals. Section 4 provides—

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

Case law

60. In *DBS v RI* [2024] EWCA Civ 95, the Court of Appeal gave its decision orally at the close of the hearing on 1 February 2024. The Court of Appeal handed down its written judgment on 9 February 2024. Carine Patry KC appeared for the appellant DBS. Edward Kemp and Tom Gillie of counsel (instructed by Advocate) appeared pro bono for the respondent. In the written judgment, Bean LJ, with whom Males and Lewis LJJ agreed, said—

"28. I agree with the observation that there is no longer any point of legal principle raised by this appeal which requires determination by the court, but I do not accept that the parties are in agreement as to the interpretation and scope of the mistake of fact jurisdiction. Far from it. In their further supplementary skeleton argument on behalf of *RI* Mr Kemp and Mr Gillie write:-

> "The Upper Tribunal is entitled to make a finding that an appellant's denial of wrongdoing is credible, such that it is a mistake of fact to find that she did the impugned act. In so doing, the Upper Tribunal is entitled to hear oral evidence from an appellant and to assess it against the documentary evidence on which the DBS based its decision. That is different from merely reviewing the evidence that was before the DBS and coming to different conclusions (which is not open to the Upper Tribunal)."

29. That is in my view an accurate description of the mistake of fact jurisdiction and corresponds with the guidance given by the Presidential Panel of the Upper Tribunal in *PF,* approved by this court in *Kihembo.*

[…]

31. It seems to me plain that the Presidential Panel in PF were saying that where relevant oral evidence is adduced before the UT in an appeal under s 4(2)(b) of the 2006 Act the Tribunal may view the oral and written evidence as a whole and make its own findings of primary fact. I would add that whether or not A stole money from B cannot be considered a matter of "specialist judgment relating to the risk to the public" engaging the DBS's expertise.

32. Turning to the decision of this court in *JHB,* Ms Patry prays in aid the observation in [93] that "on the authorities a disagreement in the evaluation of the evidence is not an error of fact". But that must be read in the context of the statement in the previous paragraph that it was a case where the UT was looking at "very substantially the same materials as the DBS". In contrast with the present case, JHB had given very limited oral evidence, which did not have a direct bearing on the decision to place him on the lists (see paragraph [90] of the judgment, cited above).

33. The *ratio* of *JHB* is difficult to discern, partly because this court found that the UT had erred in several respects any one of which might well have vitiated the decision. I venture to suggest that it may be authority for the proposition that if the UT has exactly the same material before it as was before the DBS, then the tribunal should not overturn the findings of the DBS unless they were irrational or there was simply no evidence to justify the decision. The same rule may apply where, as in the *JHB* case itself, oral evidence is given but not on matters relevant to the decision to place the appellant on one or both of the Barred Lists.

34. I reject Ms Patry's submission that the Upper Tribunal is in effect bound to ignore an appellant's oral evidence unless it contains something entirely new. Such an approach would be anomalous and unfair. It would be anomalous because, as Males LJ pointed out during oral argument, an appellant who attended the Upper Tribunal hearing and stated that she was innocent but was not cross-examined, would be liable to have her appeal dismissed because no item of fresh evidence had been put forward, whereas if she was cross-examined, and in the course of that cross-examination mentioned a new fact, that would confer on the UT a wider jurisdiction to allow the appeal on mistake of fact grounds. Usually courts and tribunals (and juries) think more highly of parties who have maintained a consistent account than those who come up with a new point for the first time in the witness box.

35. Such a technical approach would also, in my view, be clearly unjust. The DBS has draconian powers under the 2006 Act. A decision to place an individual on either or both of the Barred Lists is likely to bring their career to an end, possibly indefinitely. Parliament has given such a person the right of appeal to an independent and impartial tribunal which can hear oral evidence. It is in my view open to an appellant to give evidence that she did not do the act complained of and for the UT, if it accepts that case on the balance of probabilities, to overturn the decision.

36. I was unimpressed, indeed dismayed, by some of the policy arguments put forward in opposition to the UT having a broad jurisdiction to find a mistake of fact. One was that the DBS would have to devote greater resources to resisting appeals. Another is that the DBS might have to modify or abandon its policy of not calling complainants to give oral evidence before the UT.

37. As for the oral evidence of appellants before the UT, Ms Patry submitted that: "There is a danger of allowing people to turn up and say they are credible. The distinction on the case law is that those people may not give any new evidence – someone has already said everything [in writing], then they come on the day and they give oral evidence and the UT believes them." I have to say that I found this argument chilling. Of course some offenders, particularly some sexual predators, are superficially plausible. But where Parliament has created a tribunal with the power to hear oral evidence it entrusts the tribunal with the task of deciding, by reference to all the oral and written evidence in the case, whether a witness is telling the truth.".

61. Males LJ, with whom Lewis LJ agreed, added in that same *RI* judgment—

"44. I agree with the reasons given by Lord Justice Bean for dismissing this appeal. In view of the general importance of ground 1 and the state of the authorities, I add some further observations.

45. The approach which an appeal court will take to decisions on questions of fact made by a lower court or tribunal varies according to the nature of the appeal, the practice of the appeal court and the policy considerations which give rise to the appeal right in question. At one end of the spectrum are cases where an appeal court has no power to review findings of fact at all, however obviously wrong they may be. An example is an appeal from an arbitral tribunal under section 69 of the Arbitration Act 1996, where the appeal is limited to a question of law arising out of the award. Even though in other legal contexts it is regarded as an error of law for a court to make a finding of fact for which there is no evidence, that is not so in arbitration cases as a result of the statutory policies of supporting arbitration, minimal court intervention, party autonomy and finality of awards (*The Baleares* [1993] 1 Lloyd's Rep 215, 228 col 1). At the other end of the spectrum, an appeal may be a complete rehearing in which the appeal court makes up its own mind on the evidence and is not in any way bound by what the first instance court has decided. An example is an appeal in a criminal case from the Magistrates' Court to the Crown Court under section 108 of the Magistrates' Court Act 1980.

46. Appeals to the Court of Appeal in civil cases occupy an intermediate position. An appeal will be allowed if the decision of the lower court is 'wrong', but in general an appeal is limited to a review of the decision of the lower court (CPR 52.21). Because the Court of Appeal does not hear evidence, and in recognition of the position of the trial judge and the needs of the efficient administration of justice in the interest of the public as a whole, the decision of

the lower court on a pure question of fact will only be held to be wrong if the decision is one which no reasonable judge could have reached (e.g. *Volpi v Volpi* [2022] EWCA Civ 464 at [2], which is merely one of the latest cases to have emphasised this approach).

47. The principal question in this appeal is where on this spectrum an appeal on a question of fact from a decision of the DBS to the Upper Tribunal fits. That depends on the terms of the statute conferring that right of appeal; the procedure and practice of the Upper Tribunal which Parliament can reasonably be taken to have had in mind when passing that statute; and the need for an independent judicial consideration of allegations which may have a significant impact on all aspects of a person's life.

48. An individual who is dissatisfied with a decision of the DBS to include them on a barred list has a right of 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 [to include them in the list] was based' (section 4(2)(b) of the Safeguarding Vulnerable Groups Act 2006). Typically, a decision to include a person on a barred list will be based on a finding of fact that the person concerned has done some relevant act. In this case the act in question is that RI stole from a person in her care. In other cases it may be that the person concerned has acted in a sexually inappropriate way or has committed some form of physical abuse.

49. In conferring a right of appeal in the terms of section 4(2)(b), Parliament must therefore have intended that it would be open to a person included on a barred list to contend before the Upper Tribunal that the DBS was mistaken to find that they committed the relevant act – or in other words, to contend that they did not commit the relevant act and that the decision of the DBS that they did was therefore mistaken. On its plain words, the section does not require any more granular mistake to be identified than that.

50. That conclusion is reinforced in the light of the ability of the Upper Tribunal to hear oral evidence, as occurred in the present case. Parliament must have contemplated that an appellant would be able to give evidence to the effect that 'I did not do it'; that the Upper Tribunal would be entitled to evaluate that evidence, together with all the other evidence in the case; and that if the Upper Tribunal was persuaded accordingly, the appeal would be allowed, without the Upper Tribunal needing to find any other mistake on the part of the DBS. Of course, the evidence might not be believed, but if evidence stands up well to cross examination, that must be a factor which Parliament expected and intended the Upper Tribunal to take into account. It is inconceivable that Parliament intended to place the Upper Tribunal in a position where, having considered all the evidence and despite being satisfied that the finding of the DBS was wrong, the Upper Tribunal was powerless to allow an appeal, for want of being able to identify any other mistake made by the DBS apart from the fact that it had reached the wrong conclusion.

51. In my judgment this follows from the terms of section 4(2)(b), and is also in accordance with the approach of the Upper Tribunal in *PF v DBS* [2020] UKUT 256 which, as confirmed in *Kihembo v DBS* [2023] EWCA Civ 1547 at [26], remains good law, despite what I would regard as the problematic decision of this court in *DBS v JHB* [2023] EWCA Civ 982. On behalf of the DBS, Ms Patry seized on a sentence in *PF* at [38] that 'It is not enough that the Upper Tribunal would have made different findings', but that sentence must be seen in the context of the decision as a whole, including the summary at [51] and the broad and general statement at [39]) that:

> ‘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. …’

52. What then of the decision in *JHB*? It is not easy to discern the *ratio* of the decision, but it appears to have been along the following lines: (1) the only ‘mistake’ found by the Upper Tribunal ‘was that the DBS had a mistaken view of the facts because the UT happened to differ from the DBS in its assessment of the same or very nearly the same materials’ (see at [90]); (2) there is no ‘mistake’ by the DBS if it makes a finding which is open to it on the material before it ([93]); and (3) the proper approach of the Upper Tribunal to an appeal on a question of fact is as explained in cases such as *Volpi v Volpi* and *Subesh v SSHD* [2004] EWCA Civ 56, [2004] INLR 417 ([95]).

53. I would respectfully suggest that these cases are irrelevant to an appeal under section 4(2)(b) of the 2006 Act. They describe the approach of an appeal court which does not hear evidence for itself to a factual decision by a lower court which (usually but not always) has heard such evidence. But an appeal under section 4(2)(b) will generally involve the opposite situation, i.e. the DBS will have made a decision on the papers after considering written representations, while the Upper Tribunal is able to hear oral evidence. Moreover, the Upper Tribunal is the first independent judicial body to consider what will often be serious allegations against the barred person and its ability to determine the facts for itself (as distinct from whether those facts make it appropriate to include the person on the barred list, which is exclusively a matter for the DBS) is an important procedural protection (cf. *R (Royal College of Nursing) v SSHD* [2010] EWHC 2761 (Admin), [2011] PTSR 1193 at [102] and [103]).

54. It may be, nevertheless, that *JHB* is binding for what it decides. I would respectfully suggest, however, that its *ratio* must be confined to cases where the Upper Tribunal either hears no oral evidence at all, or no evidence which is relevant to the question whether the barred person committed the relevant act – in other words, where the evidence before the Upper Tribunal is the same as the evidence before the DBS. That was the position in *JHB*, where Lady Justice Elisabeth Laing explained at [90] that ‘the UT heard very limited evidence from JHB, for example, that he had not been interviewed by the police about the allegation on which finding 3 was based’; and that ‘The UT does not seem to have heard much evidence which had a direct bearing on the matters on which the DBS relied in making findings 2 and 3, let alone any significant evidence’.

55. *JHB* will not apply, therefore, when the appellant does give oral evidence. I accept Mr Kemp’s submission that, when this happens, the evidence before the Upper Tribunal is necessarily different from that which was before the DBS for a paper-based decision. Even if the appellant can do no more than repeat the account which they have already given in written representations, the fact that they submit to crossexamination [sic], which may go well or badly, necessarily means that the Upper Tribunal has to assess the quality of that evidence in a way which did not arise before the DBS.

56. Finally, I too record my gratitude to Mr Kemp and Mr Gillie for their assistance in this case.”.

62. In *Lachaux v Lachaux*[1] [2017] EWHC 385 (Fam), [2017] 4 WLR 57, Mostyn J observed (our underlining)—

> "35. When making my findings about the disputed facts I have relied first on those contemporary documents which I am satisfied are authentic. I share the misgivings of Leggatt J in placing weighty reliance on carefully prepared "remembered" accounts of past events as expressed either in a witness statement or orally from the witness box. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm) he said at paras 15 – 22:
>
> > "An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
> >
> > While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
> >
> > Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
> >
> > Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
> >
> > The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious

[1] https://www.bailii.org/ew/cases/EWHC/Fam/2017/385.html.

where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth."

36. In line with Leggatt J, I prefer to try to determine the truth by applying the dissenting speech of Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, HL:

> "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over-much discussion of it with others?

> Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, it is so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.””.

D. Analysis

(1) Preliminary analysis: the written evidence

63. Before giving our analysis as to mistakes of fact, we make the following preliminary points about some of the written evidence. These preliminary points will inform our analysis as to mistakes of fact.

(a) The Serious Incident Report

64. The Serious Incident Report was drafted by DJ, a staff member who was in the home at the time of the incident (but who did not profess to have seen the appellant's arms connecting with L). As well as drafting the report, DJ initialled it. (DJ was also the staff member to debrief TM.) The Serious Incident Report was also initialled by PR, who had returned to the home in the aftermath of the incident and did not profess to have witnessed the appellant's arms connecting with L. The Serious Incident Report was also, crucially, initialled by AD (page 52). AD is the staff member who professed, according to the Serious Incident Report, to have seen the appellant's arms connecting with L's "*body (chest and shoulders)*".

65. The Serious Incident Report is the first dated document before us to have been created after the incident. The appellant's manuscript report was in fact the first document created after the incident. But that was not before us. The Serious Incident Report is dated the same day as the incident.

(b) The "Designated Officer (formerly LADO) referral form for Professionals"

66. Next in our preliminary analysis is the second of the dated documents before us to have been created after the incident: the "Designated Officer (formerly LADO) referral form for Professionals" ("the Lado referral form"). We say the second of the dated documents because it is not apparent when the debrief document was created. The Lado referral form was completed by BD, whose role at the home was Acting Assistant Team Manager. It was common ground that he did not witness the incident, but turned up later the same evening. It was common ground therefore that, in completing the Lado referral form, BD was merely repeating (or rather purporting to

repeat) what others had told him. The exception to that is that the report addresses his own involvement in the aftermath, including his allegation that the appellant had told him "*I hit him he was spitting water at me*" (page 34).

67. The Lado referral form completed by BD differed in a number of ways from the Serious Incident Report (our underlining)—

(1) The Serious Incident Report said that "*DJ stood between [L] and [the appellant]*", whereas the Lado referral form completed the following day by BD, a non-witness, said *"[AD] stood in-between [the appellant] and [L]*".

(2) The Serious Incident Report said "*AD saw [the appellant] swinging her arms in an over arm motion in the direction of [L] connecting with his body (chest and shoulders)*", whereas the Lado referral form said *"[AD] saw [the appellant] (Agency Staff) swinging her arms in the direction of [L] and connecting with his upper body chest and shoulders*". In other words, the Serious Incident Report specified two places on L's body with which the appellant's arms had connected: his chest and his shoulders, whereas the Lado referral form specified three places on L's body with which the appellant's arms had connected: his upper body and his chest and his shoulders.

(3) The Lado referral form completed by BD reported that L "*was raging clenching his fists and red in the face making verbal and physical threats to [the appellant] saying "I am going to punch you in the face, I am going to hit you like you hit me, look what you have done to me you fucking bitch""*. The Serious Incident Report however contains no statement that the appellant said "*you fucking bitch you hit me*".

(4) The Lado referral form completed by BD appears to say, given the context, that L hit the side window of the building and not that he hit the side window of the car. By contrast, the Serious Incident Report appears to say that L hit the side window of the car. The Serious Incident Report does not say "*of the car*". But the order in which hitting the window is mentioned in the Serious Incident Report (the report assented to by DJ and AD) implies that the report means "*of the car*" rather than "*of the building*".

68. A couple of points emerge from the differences identified at paragraph 67 above. First, the differences between what BD said in his Lado referral form and what the staff had said in the Serious Incident Report cast doubt on the reliability of BD's report in the Lado referral form. That is not simply because it was drafted by a non-witness to the incident, but also because it does not reflect what was said in the Serious Incident Report (to which witnesses DJ and AD had initialled their agreement). Second, if BD's report got those matters wrong, his report could have got other things wrong too, in particular, his assertion that L had said "*you fucking bitch you hit me*". That statement does not appear in the Serious Incident Report, as we have noted. Nor is it apparent where BD got it from. We return to this later in this decision.

69. The new points introduced into the completed Lado referral form appear then to have crept into later documents. By "*new*", we mean that they did not reflect the

Serious Incident Report initialled by the witnesses. In particular, see the record of the JEM meeting of 3 March 2021, the 22 March 2021 employment agency referral form, and the 30 June 2021 police letter to the DBS. We next take each of those documents in turn, starting with the record of the JEM meeting.

(c) Record of JEM meeting which took place on 3 March 2021

70. As to the record of the JEM meeting, we make several observations—

(1) First, the JEM meeting minutes recorded that "*DC Annmarie Brown confirmed that CHILD had red marks on his chest area and his back which were indicative of a struggle. It is difficult to say if they were caused by him being struck, but it is clear that some sort of struggle / fight had taken place. A member of staff had said that they intervened when they heard the struggle taking place and stood between [the appellant] and CHILD, although Police have not been able to get a statement*". This however was contradicted by what the police said in their 30 June 2021 letter to the DBS nearly four months later: "*When officers arrived, there was no sign of any injuries*".

(2) Second, the outcome discussion part of the JEM meeting minutes recorded that "*The DO outlined that the Police investigation and [the appellant's] statement is clear that there has been an incident during which [the appellant] struck out at CHILD causing injuries*". It was not apparent where this reference to causing injuries had come from; no-one appears actually to have said they saw any injuries (apart from L himself who pointed to his chest while FaceTiming his Mum).

(3) Third, the JEM meeting minutes record the statements of the appellant and L as having occurred in the reverse order from what was recorded in the Lado referral form. The JEM meeting minutes first recorded that the appellant said "*If he hits me, I'll hit him back. I'm not scared of him*" and then recorded that the child "*was backing away and shouting: "You fucking bitch. You hit me'*". That is perhaps more of a loose transposition of what was said in the Lado referral form rather than a difference from it. But nonetheless, this part of the JEM meeting minutes seems merely to repeat what was said by BD in the Lado referral form.

(4) Fourth, BD and TM are the only ones from the home who attended the JEM meeting. TM is the home Team Manager who did not witness the incident or its aftermath, and was briefed later. BD attended the aftermath but did not witness the part of the incident where the appellant's arms allegedly connected with L. Nor did BD witness what was said by anyone during the incident. So the JEM meeting notes will not contain anything communicated directly to that meeting by a witness. DC Annmarie Brown attended the JEM meeting. But the JEM meeting minutes do not make clear which if any parts of the minutes came from her own dealings (if any) with L or with the appellant, or came from her at all.

71. Generally, the JEM meeting minutes seem based on what BD had said in the Lado referral form and appear to add nothing to the evidence of the alleged assault.

(d) Referral form by TW of appellant's employment agency

72. Next in our preliminary analysis is the referral form by TW of the employment agency. That form said *"[The appellant] was seen swinging her arms in the direction of a young person and connecting with his upper body, chest and shoulders*" (our underlining). This statement by TW of the agency appears taken from the Lado referral form, or at least, reproduces what BD had said in that form. This statement by TW of the agency does not however match the Serious Incident Report, created earlier than TW's referral form. The Serious Incident Report said instead: "*connecting with his body (chest and shoulders)*" (again our underlining). It appears that TW took from BD the information that TW entered into the referral form that TW completed, given that BD told the appellant that he would be informing the agency. BD however, as was common ground, was not a witness to the incident itself.

73. Moreover, although containing a statement allegedly made by the appellant (and so appearing ready to include statements allegedly made), the referral form completed by TW of the agency does not say that L said "*you fucking bitch you hit me*" or that L said "*you hit me, look what you have done to me you fucking bitch*". Nor does the form say that the appellant told BD that the appellant had hit L (even in the part of the referral form asking whether the appellant had admitted the conduct). We make nothing of the failure in the form to mention what L had allegedly said; it was not clear that the form was intended to include statements by the alleged victim. But given that the form did repeat the appellant's alleged statement that *"if he hits me i'll hit him back i'm not scared*", we would expect the form also to have contained another key statement allegedly made by the appellant, that is, "*I hit him he was spitting water at me*".

(e) Undated debrief meeting between DJ and TM

74. Next in our preliminary analysis is the note of the debrief meeting in which DJ briefed TM (Team Manager at the home) about the incident. That note was initialled by AD as well as by DJ. AD was the one who professed to have seen the appellant's arms connecting with L. By initialling it, AD agreed that the content of that debrief note was accurate. The note did not however materially add to the description in the Serious Incident Report of the appellant's arms connecting with L. Nor did the note add to what the appellant and L had each reportedly said.

(f) Northamptonshire Police 30 June 2021 letter to DBS

75. Next in our preliminary analysis is the 30 June 2021 letter from the police to the DBS. It is not apparent – from that letter or from the other evidence – whence the police got the "information" contained in that letter. The police letter plunges straight into a report of what had happened, as if it was all fact. The letter does not even report the police having spoken to anyone except the appellant. In particular, the letter does not report that the police had spoken to L and to AD. The Lado referral form, completed not by the police but by BD, did report: "*27th August 2020 – Police arrived at [home]And [sic] took a statement from staff member [AD] and young person [L]. The Police requested details of [the appellant] as well as her address*". Even if we were to accept as accurate BD's report that the police had spoken to AD and to L, it was not apparent

from the police letter or from other evidence which parts of the police letter, if any, reported what the appellant, L and AD had each told the police directly. And there was no statement in evidence from either AD or L. The only attribution from the police of what the police had been told by anyone is the manuscript notes of the appellant's police interview (and even then, the letter seems to elevate a statement made in the interview that the child was taken to McDonald's into a statement that the appellant was among those who took him). Where the police letter reported that L had said something during the incident, did that come from L himself directly to the police? Or did it come from AD? Or did it come from someone else the police might have spoken to informally at the home? Where the police letter reported that the appellant had said or done something, did that come from L or AD directly to the police? And if it came from AD, which parts of it came from her own knowledge and which parts came from what she had been told?

76. There is also the allegation in the police letter that "*She wrote that she defended herself and swung at the child*". We cannot see in the rest of the evidence that the appellant was said to have written this. We do not even have evidence that the appellant's written statement was read by anyone, or even passed to someone other than BD (the Acting Assistant Team Manager who arrived on scene in the aftermath).

77. This lack of attribution in the police letter is of particular concern in relation to the statement in it that "*The child was backing away and shouting "you f***ing bitch, you hit me…*". The letter did not say whence the police had got the statement. Was it from BD? Or from the child himself? We return to this below.

78. We take the following from paragraphs 64 to 77 above. It appears that documents dated after the Serious Incident Report have included "evidence" taken from the Lado referral form completed by BD, when that form itself contained assertions (a) which were not taken from a document initialled by the two key witnesses, AD and DJ, and (b) whose source was not apparent.

(g) The appellant's contemporaneous written account

79. Finally in our preliminary analysis is the most contemporaneous evidence, the account written by the appellant in the hour or so after the incident. That account has not been provided to the appellant, the DBS, the police or the tribunal. The appellant has been confident – without being sure that it will not be found and put to the tribunal – in asserting to us a belief that it supports her account that she did not intend to assault the child.

(2) Mistake of fact in finding that the appellant assaulted the child

80. We find that the DBS made a mistake in finding that the appellant assaulted the child.

81. It is clear that, in this context, "*assault*" was used to mean battery. We asked Mr Serr what mens rea the DBS had intended in making this finding[2]. His submission was to the effect that it had to be intentional hitting.

[2] See paragraph 19-221 of Archbold.

82. We find that the appellant did not intend to hit L beyond any contact she might make in attempting to fend him off and defend herself.

83. We say that for the following reasons.

(a) Alleged statements by L to the appellant that she had hit him

84. We do not find that L said "*you fucking bitch you hit me*", for the following reasons.

85. First, the evidence of that statement in the three places it occurs is not reliable.

86. Those three places are—

(a) the Lado referral form (dated the day after the incident) drafted by BD (page 32);

(b) the JEM minutes of the 3 March 2021 meeting (page 107); and

(c) the 30 June 2021 letter from Northamptonshire Police to the DBS (pages 62 to 64).

87. We take each of those documents in turn.

88. As to the report in the Lado referral form of L having said "*you fucking bitch you hit me*", BD who drafted that report was not on scene at the time L allegedly said that. The order in which AD and DJ appeared on scene, according to the Lado referral form, suggests that it was said in front of AD. However, the Lado referral form does not say that AD had told BD that L had said it. The form does not say where BD got it from. The Lado referral form has other aspects casting doubt on its reliability too; see paragraphs 66, 67 and 68 above. The allegation that L had said "*you fucking bitch you hit me*" might have come to BD from L himself. But there is nothing to show that. The evidence in the Lado referral form that L said "*you fucking bitch you hit me*" is not therefore reliable.

89. As to the reference in the JEM meeting minutes to L having said "*you fucking bitch you hit me*", those minutes too do not say where JEM got it from. Two persons from the home attended the JEM meeting: TM (Team Manager) and BD (Acting Assistant Team Manager). BD had been on call and arrived in the aftermath of the incident on the same evening. TM was briefed on an unknown date by DJ (page 60). However, nowhere in the papers, including in the note of that briefing, is it said that DJ mentioned L having said to the appellant "*you fucking bitch you hit me*". The briefing note recorded that DJ told TM that AD had told DJ, during the incident, that AD "*had witness [sic] agency worker [the appellant] swinging her arms at [L] (over arm, front crawl style) connecting with various parts of [L] body*". This briefing note says nothing however about what L said except that he was "*verbalising his intention*" to assault the appellant (page 60). So there is no reason to find that JEM got from TM of the home the allegation that L had said "*you fucking bitch you hit me*".

90. DC Annmarie Brown also attended the JEM meeting. The allegation that L had said "*you fucking bitch you hit me*" could theoretically have come from DC Brown. But where she would have got it from is not apparent from the evidence before us. If

she was one of the officers who had attended the home after the incident, she might have heard it from AD or from L himself. We have no evidence of DC Brown ever having been told it herself however. Moreover, in citing what AD had reported, the JEM meeting minutes did not say that AD had reported L having said *"You fucking bitch. You hit me*".

91. We do know, however that BD asserted in the Lado referral form that L said "*you fucking bitch you hit me*". And BD was at the JEM meeting. The best guess, and it would be a guess, is that BD repeated to the 3 March 2021 JEM meeting what he had said the day after the incident in the Lado referral form. If that is where the JEM meeting got it from, then it is not an additional source of evidence of L having said "*you fucking bitch you hit me*"; rather, it repeats evidence we already have – that in the Lado referral form. If that is not where the JEM meeting got it from, then it is not clear where it could have come from. So it cannot in any event be relied on as evidence additional to that in the Lado referral form.

92. The 30 June 2021 police letter to the DBS does not say where the allegation came from, either. Again, it could be repeating what BD had said in the Lado referral form. Or it could have come from a police officer having spoken to AD or L, at the home. However, the police seem to have attended the following day (page 33)[3]. By that time, DJ had (the day before) drafted the Serious Incident Report, which AD at some point initialled. It seems unlikely that AD would have said it to the police the day after not saying it for inclusion in the Serious Incident Report. If the police in fact attended the same day as the incident (meaning the date was wrong for that attendance in the Lado referral form), and even if AD did say it either to BD or to the police, AD had clearly changed her mind about it by the time she came to initial the Serious Incident Report, which did not include it. The same applies if DJ was the one to have reported that L had said "*you fucking bitch you hit me*".

93. Our second reason for not finding that L said "*you fucking bitch you hit me*" is that it does not appear in the Serious Incident Report. That report was drafted by one of the witnesses (DJ) and initialled by the other (AD). In that report, the first words reported as coming from L during the incident were: "*that fat bitch has thrown water all over me and I'm going to punch her right in her fucking face the bastard*", and not that the appellant "*has hit me*". If – whether before or after saying "*that fat bitch has thrown water all over me*" – L had said "*you fucking bitch you hit me*", one would expect that to be recorded in the Serious Incident Report, initialled by the two witnesses, rather than only "*that fat bitch has thrown water all over me*". The first time that, according to the Serious Incident Report, L makes any reference to the appellant having hit him is when he FaceTimes his Mum later, in the garden—

> "DJ stayed outside with [L] who then facetimed his mum on his mobile. [L] told his mum that a member of staff had hit him and that he could call the police and get her sacked".

(We return later in this decision to what we make of this part of the Serious Incident Report.)

[3] Lado referral form by [BD]—
"Telephone call to the police to inform them of the above incident. Incident number 604-26/8/2020
27th August 2020 – Police arrived at [home]And [sic] took a statement from staff member [AD] and young person [L]. The Police requested details of [the appellant] as well as her address. This information was shared with the police as requested.".

94. Crucially, the Serious Incident Report does not include "*you fucking bitch you hit me*" even in the part of the report which instructed: "*Highlight any significant comments made during the Incident*". In that part of the Serious Incident Report, DJ wrote (and AD agreed by initialling the report)—

> "[The appellant] was heard saying "if he hits me I'll hit him back I'm not scared of him"
> [L] told DJ [the appellant] had pushed him into the radiator.
> [L] told AD that [the appellant] had thrown his water bottle at him.".

95. That part of the Serious Incident Report was the ideal opportunity to record that L had also said "*you fucking bitch you hit me*", had AD and DJ wanted to assert that he had said it.

96. Our third reason for not finding that L said "*you fucking bitch you hit me*" is that it was not mentioned in the note of the debrief meeting between TM and DJ (both of the home). DJ provided the information in that note, and AD initialled the note as accurate. DJ and AD were the two witnesses to the incident. This briefing note says nothing about what L said except that he was "*verbalising his intention*" to assault the appellant (page 60).

97. Fourth and finally, in our reasons for not finding that L said "*you fucking bitch you hit me*", it follows from what we say above that the only attributed instance of this statement is in the Lado referral form, drafted by BD. So we can attribute it to BD. But he did not observe the incident and it is not apparent where he got it from.

98. For the same reasons as those at paragraphs 85 to 97 above – but changed mutatis mutandis to refer to the following alleged statement – we do not find that L said "*you hit me, look what you have done to me you fucking bitch*".

(b) Not evidence of assault in any event

99. But even if L did say "*you fucking bitch you hit me*" or "*you hit me, look what you have done to me you fucking bitch*", that was not of itself evidence that the appellant had assaulted him (even if L intended it so). It was consistent with her arms having connected with his chest and shoulders while trying to fend him off and defend herself. We return to this later.

(c) Alleged statement by L to his mother that a staff member had hit him

100. We said we would return to what we make of the report in the Serious Incident Report that L told his Mum that a staff member had hit him. This came after he had been kicking the front door, threatening and swearing at the appellant and calling her a fucking fat black bitch and black cunt who he was going to "get". Given that it is reported in the Serious Incident Report, which is the document we find the most reliable, we accept that L did tell his Mum that a member of staff had hit him. We accept too that he meant that the appellant had assaulted him, rather than merely that she had connected with his body in fending him off. However, that does not mean that she in fact assaulted him. We accept that L was angry and that he wanted, as he was reported in the Serious Incident Report to have said, to "*get*" her. But we do not accept the DBS's submission that the reason he was angry must have been because she

assaulted him. The appellant had stood up to him by removing the water bottle from him and then fending him off. That of itself would have sufficed to anger him.

(d) Alleged admission to BD

101. We do not accept that, as stated by BD in the Lado referral form he completed the day after the incident, the appellant "*informed me "I hit him he was spitting water at me"*". The appellant denied to us that she had said it. We believe her, and find that BD must have misheard her, for the following reasons—

(1) First, when we asked the appellant why BD would have said it, she told us—

> "I don't know. May be my language. Maybe he didn't hear me real good. I am African. When I came here few years ago my English was not pure. I never said I hit him – only that he hit me. Maybe he misunderstood. He just listened, didn't probe".

We accept the appellant's evidence that BD did not probe what she said and that her English was not as good at the time of the incident as it is now.

(2) Second, in court, the appellant spoke very fast and we ourselves found it sometimes hard to hear everything she was saying. We had to ask her to repeat herself at the hearing, when her English was better than it would have been three and a half years ago at the time of the incident. That increases the likelihood that, without BD similarly probing three and a half years ago, he misheard what the appellant said.

(3) Third, it appears that BD himself might have been unsure – by the time he informed the agency of the incident – of whether he had heard the appellant correctly. The agency's referral form post-dates the JEM meeting (whose minutes did repeat BD's allegation of the appellant's admission). The agency's referral form did not include that the appellant had told BD that she had hit L. Given that TW of the agency had included in that form the allegation that the appellant had said "*if he hits me i'll hit him back i'm not scared*", one would expect TW also to have included other statements allegedly made by the appellant if those statements had been reported to TW. We touched on this at paragraph 73 above. There is even a section, later in the referral form completed by the agency, which requests "*Information as to whether the referred person has accepted responsibility or admitted the conduct or any part of it, provided any explanation or shown any remorse or insight*". In response to that request, TW had written "*No she hasn't*". Had BD reported to TW that the appellant had admitted to him that she had hit L, one would expect that reported admission to be included in this part of the agency's referral form. We find therefore that BD did not report to the agency that the appellant had admitted to hitting L. Had he been sure of having heard that admission, we would expect him to have passed it on to the agency.

(e) The description in the Serious Incident Report

102. The Serious Incident Report did not say that AD (or anyone else) saw the appellant "*hitting*" L. It used rather the carefully neutral word "connecting": "*connecting with his body (chest and shoulders)*". That report is not therefore evidence that the appellant intentionally hit L.

(f) Generally

103. We have not accepted that L said "*you fucking bitch you hit me*" or that he said "*you hit me, look what you have done to me*". In view of that, and of our other points above, even the written evidence did not, on analysis, support that the appellant had intentionally hit L. The only person who professed to have witnessed the appellant making physical contact with L was AD. She did not say that the contact was intentional, or even use the word "*hit*". She said, by initialling the Serious Incident Report, that the appellant's arms "*connect[ed] with his body (chest and shoulders)*". The neutral "*connecting*" has been chosen over less neutral terms such as "*hitting*". It seems the other evidence nonetheless elevated into hitting and assault something which was not described as either by anyone who witnessed the incident apart from L (and even then, we do not have evidence from him before us, nor even a record of what he told the police).

(3) Tribunal's finding of fact: the appellant's arm or arms did connect with L's chest and shoulders

104. We do however accept the allegation in the Serious Incident Report, initialled by the only person (AD) said to have seen this part of the incident, that the appellant's arm or arms did connect with L's chest and shoulders. We frame this finding as connecting with L's chest and shoulders because the Serious Incident Report did not say the appellant connected with L's upper body in addition to his chest and shoulders (contrary to how it was put in the decision letter: "*hitting his upper body, chest and shoulders*"). The Serious Incident Report said "*connecting with his body (chest and shoulders)*". It did not mention upper body at all. "*Upper body*" appears to have crept in with later repetitions of the incident, to describe chest and shoulders. But it has then acquired a life of its own in becoming an additional area that the appellant's arm or arms were said to have connected with.

105. We find that this "*connecting*" occurred while the appellant was "*swinging her arms in the direction of [L]*" as AD reported in the Serious Incident Report. That does not however mean that the appellant intended to hit L rather than simply flailing in trying to fend him off. First, she had not had de-escalation training. Second, we accept her evidence that she thought that she was not allowed to leave the room and thereby leave L alone. Given both of those points, it is likely, and we find, that the appellant's arms were indeed flailing, and connected with L, as she tried to fend him off.

106. We make this finding despite its not being the appellant's case because we find that the appellant simply does not recall making contact with L. We say that for the following reasons—

(1) First, having appeared to assent in oral evidence to counsel's proposition that "*you say you kept your arms by your side*", the appellant went back on that somewhat—

> "Q – She says you swung arms, you say never happened.
>
> A – I can't say.
>
> […]
>
> Judge – About Mr Serr's question about not raising arms?
>
> A – Not by my side just trying to get away".

It appeared from this that the appellant was not quite sure exactly what had happened.

(2) Second, the police letter to the DBS reported that, "*When asked by the interviewing officer if she had swung her arms she stated she couldn't remember but said he was trying to fight her*".

(3) Third, as Judge Hemingway said in paragraph 5 of his grant of permission to appeal, "*the incident appears to have been a fast moving one with the possibility of accounts and recollections becoming confused*".

107. Moreover, when someone tells the appellant that her arm or arms did in fact make contact with L, it is not surprising that the appellant, not recalling it, does not wish to accept it as a fact (especially in appeal proceedings whose outcome will affect her career). But that does not mean she is lying on that point.

108. We asked Mr Serr: what if we found that, in flailing her arms, the appellant did make contact with L, but not intending to assault him. Mr Serr submitted that it would be difficult for the tribunal to make that finding because it would not fit with either party's case. He submitted moreover that such a finding would not reflect the documentary evidence. He said, though, that such a course is open to the tribunal in some circumstances.

109. We disagree that such a finding would not reflect the documentary evidence. The Serious Incident Report initialled by AD – the only person who professed to see this part of the incident (apart from L himself from whom there is no statement) – said that AD saw the appellant's arms connecting with L's chest and shoulders. As we observed earlier, the neutral "*connecting*" was chosen instead of another verb such as "*hitting*". And AD and the Serious Incident Report said nothing about the appellant's intention. The Serious Incident Report was evidence provided by the DBS. Our finding is therefore consistent with the DBS's own evidence.

110. Those were our reasons for finding that the appellant did not assault the child.

111. We turn next to the DBS's other finding, that the appellant said *"if he hits me I'll hit him back I'm not scared of him*".

(4) Whether mistake of fact in finding the appellant to have said "*if he hits me I'll hit him back I'm not scared of him*"

112. We find that the appellant did say "*if he hits me I'll hit him back I'm not scared of him*". We find however that she did not mean that she would in future assault L. We take each of those two findings in turn.

(a) The appellant did say "if he hits me I'll hit him back I'm not scared of him"

113. The Serious Incident Report (initialled by AD and DJ), and not merely the Lado referral form (drafted by BD who was not there), said that AD had heard the appellant say "*if he hits me I'll hit him back I'm not scared of him*". This part of the Serious Incident Report said (our underlining)—

> "DJ hearing the shouting immediately came out of the dining room and straight into the reception asking what was going on, unaware that PR had left the building to pick up young person SG.
>
> [L] was shouting at the top of his voice and was standing in front of the chair near the radiator by the snug window, his t shirt soaking wet. [L] was raging, puffing up his chest and clenching his fists calling [the appellant] a fucking cunt and black bitch. [The appellant] was standing not too far away from [L]. [L]'s drinks bottle was lying empty on the carpet by [L]'s feet.
>
> AD was trying to calm [L] down. DJ stood between [L] and [the appellant] asking [L] to calm down and tell her what was wrong. [L] said "that fat bitch has thrown water all over me and I'm going to punch her right in her fucking face the bastard" [L] was trying to get to [the appellant] by trying to barge past DJ, his fists were clenched and face was red with rage. AD and DJ asked [L] several times to calm down but he continued to try and get to [the appellant].
>
> [The appellant] stood behind DJ, she said something that DJ couldn't quite make out but AD heard [the appellant] say "if he hits me I'll hit him back I'm not scared of him" AD guided [L] away with a half shield to his room. DJ followed and asked [L] again to calm down. He immediately went back into reception, calling [the appellant] a Black Cunt and that he was going to punch her.".

114. We accept that AD believed that she had heard the appellant say *"if he hits me I'll hit him back I'm not scared of him*". First, we have already believed AD and accepted that AD saw the appellant "*connecting*" with L's chest and shoulders. Second, the Serious Incident Report was careful to use the neutral "*connecting*", rather than "*hitting*", for the part contributed to that report by AD (who was the only one who professed to have seen the "*connecting*"). This suggests care not to gloss or exaggerate. Third, similarly, DJ was up front in the Serious Incident Report about being unable quite to make out what the appellant had said. This too suggests care on the part of those initialling the report not to exaggerate. So when the Serious Incident Report does go so far as to say that AD heard the appellant say "*if he hits me I'll hit him back I'm not scared of him*", we accept that AD believed herself to have heard that.

115. It is possible that AD misheard the appellant. We accept from the extract at paragraph 113 above that DJ, "*couldn't quite make out*" what the appellant had said. And yet DJ was, we accept, standing in front of the appellant, between the appellant and L. So the sound must have come forward from the appellant towards DJ, rather

than away from DJ. And yet DJ still "*couldn't quite make it out*". Moreover, the extract at paragraph 113 above paints a picture of noise and of a variety of simultaneous actions. It is possible that, in the midst of that, AD misheard. And we note that the appellant very fairly said she did not know, in answer to "*is it possible that AD misheard?*" and did not accuse AD of lying about this.

116. However, although it is possible that AD misheard the appellant, it is more likely – and so we find – that AD did not mishear her. We say that for the following reasons. First, AD had worked with the appellant on shifts; AD was probably more familiar with the appellant's mode of speech than was BD (whose assertion of the appellant's admission we have rejected). Second, the appellant's voice will have been raised in the thick of the incident, by contrast with later when the incident was over and she was with BD in the separate room. Third, if AD had been in any doubt at all that the appellant had in fact said it, AD would not in our judgment have recorded it in the Serious Incident Report, given what we say at paragraph 114 above.

117. It is for those reasons that we find that the appellant did say "*if he hits me I'll hit him back I'm not scared of him*".

(b) We find however that the appellant did not mean she would in future assault L

118. It is for the following reasons, however, that we find that the appellant did not mean, by saying "*if he hits me I'll hit him back I'm not scared of him*", that she would – even in the very near future – assault L.

119. We have, in the extract at paragraph 113 above, repeated the context of that statement. This is because (unlike the alleged admission later to BD) it shows – and we accept – that the appellant made the statement in the thick of the incident. At that point, the situation was this: (i) L was separated from the appellant only by DJ, (ii) L was still threatening physical violence to the appellant ("*I'm going to punch her right in her fucking face the bastard*"), and (iii) L was still trying to get physically close to the appellant to act on that threat: "*trying to get to [the appellant] by trying to barge past DJ, his fists were clenched and face was red with rage. AD and DJ asked [L] several times to calm down but he continued to try and get to [the appellant]*".

120. We find that – faced with an aggressive L trying to get to her to punch her face – the appellant said "*if he hits me I'll hit him back I'm not scared of him*" due to anxiety, fear and a lack of training, and in a fight or flight response. We accept, from the Serious Incident Report, that the appellant said it at the point when L was trying to punch her. In other words, we find that she said it in the face of imminent further violence. She may not have had time to consider why she was saying it. But if she did consider why she was saying it, we find that, at its highest, it meant nothing more than "*I will defend myself*" (for L to hear while trying to attack her and to be discouraged from attacking her). While training might have taught the appellant to walk away rather than try to defend herself, she had not had any de-escalation training by that point. Moreover, walking away from an aggressor who was trying to get to her would not necessarily have worked; he was moving towards her and we find he would have followed her had he not been removed. It was understandable for the appellant to have said something intended to discourage her aggressor in those circumstances. We say that especially in view of her lack of training in how to de-escalate in what might be considered counter-intuitive ways.

(c) Present tense narration of the past

121. We deal finally with Mr Serr's submission for the DBS that, in saying "*if he hits me I'll hit him back I'm not scared of him*", the appellant was giving a present tense narration of the past, that is, that she meant "*he hit me and I hit him back*". Mr Serr submitted that it would be a strange way of looking at it to construe the statement as referring only to the future. We do not accept that submission. The DBS found that it referred to the future, albeit the near future. We have dealt with it on that basis, and not on the basis that it was an admission of having intentionally hit the child.

(5) Proportionality

122. Since we are remitting (see below), we do not address proportionality. If the DBS's new decision is to reinclude the appellant in the children's barred list (having meanwhile removed her pursuant to section 4(7)(b)), the DBS will explain in that decision why that new decision is proportionate. The appellant will be entitled to seek permission to appeal against that new decision.

(6) Disposal

(a) Remittal

123. Mr Serr submitted that "*if you find she never assaulted him, ie. never struck him at all, I accept remove 'cause the threat would not suffice. The key was the striking of the child*".

124. We have indeed found that the appellant did not assault L. But we have not found that she did not make any physical contact with him at all. We have found that she did not intend to hit him but that her arms were indeed flailing, and that they or one of them connected with L, as she tried to fend him off. Mr Serr submitted that, if we were to make that finding, the appropriate course would be remittal, for the DBS to make a new decision based on that finding. We accept that submission and are remitting, with the following findings.

(b) Findings of fact which the tribunal has made and on which DBS must base its new decision

125. The DBS must base its new decision on the following findings of fact—

(1) The appellant did not intend to hit L. But her arms were flailing, and one or both arms connected with his chest and shoulders, as she tried to fend him off and defend herself.

(2) The appellant did say "*if he hits me I'll hit him back I'm not scared of him*".

(3) But she said it for the reasons, and with the meaning, mentioned at paragraphs 118 to 120 above.

(4) The appellant had not, by the time of the incident, had training in de-escalation, or moving someone away from a situation, or crisis

handling or restraint (we make this finding because we accept her evidence on this).

E. Conclusion

126. It is for all of the above reasons that we allow the appeal to the extent of remittal, and that we make the findings on which the new DBS decision must be based.

127. We remind the DBS that section 4(7)(b) of the Safeguarding Vulnerable Groups Act 2006 requires the DBS to remove the appellant from the list until the DBS makes its new decision, unless the tribunal directs otherwise. We have not been invited to direct otherwise and do not direct otherwise.

Upper Tribunal Judge Rachel Perez
John Hutchinson
Suzanna Jacoby
18 April 2024