NC v Disclosure and Barring Service
[2024] UKUT 42 (AAC)

IN THE UPPER TRIBUNAL **UT ref: UA-2021-000378-V**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from Disclosure and Barring Service

ORDERS

The Orders of 22 May 2022 remain in place.

One of those orders prohibited any person from disclosing or publishing any matter likely to lead members of the public to identify the applicant or her partner (as at February 2021), or the service user in these proceedings.

Any breach of any of those Orders is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Between:

NC

Appellant

- v –

The Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Wright
Upper Tribunal Member Tynan
Upper Tribunal Member Akinleye

Decision date: 7 February 2024
Decided after a remote (video) oral hearing on 28 September 2023

Representation:
Appellant: Steven Galliver-Andrew of counsel instructed by Fylde law
Respondent: Bronia Hartley of counsel instructed by the DBS.

DECISION

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

REASONS FOR DECISION

Introduction

1. The responsibility for drafting this decision was Judge Wright's. He wishes to apologise to the parties at the outset for the delay there has been in his writing this decision.

2. This is an appeal by NC against the DBS's decision of 22 October 2021 to include her on the Children's Barred List and the Adults' Barred List.

The DBS's decision in summary

3. The basis for the DBS's decision, in short, was that NC on or about 19 February 2021 filmed a vulnerable service user when she was asleep and without her knowledge or permission, sent those videos of that vulnerable adult to NC's colleague (who at least at that point in time was also NC's partner), and that NC had actively engaged in an exchange of messages through Facebook with that colleague which were derogatory in nature of the service user.

4. It is important to stress at this stage that none of these facts are disputed by NC.

Grounds of appeal

5. The two grounds on which permission was given for this appeal to be brought by NC to the Upper Tribunal are as follows.

6. First, it was arguable the DBS's decision was erroneous in law because it was arguable that NC having "engaged in relevant conduct" in relation to the service user was not established under paragraphs 3 or 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the SVGA").

7. The basis for this ground of appeal is that the conduct relied on in the DBS's decision was the actions of NC in filming the service user while the service user slept, sharing that video with her then partner and commenting on the service user while she slept. Importantly, none of these actions were known to the service user. If NC's conduct was the actions of her filming the service user while she slept, sharing that film privately with her then partner and talking about the service user with her partner as she slept, it was arguable that that was not conduct which in fact harmed the service user (as she was unaware of the filming, sharing of the video and the comments), did not cause the service user to be harmed (for the same reasons), did not put her at risk of harm (for the same reasons), was not an attempt to harm her (for the same reasons), and was not conduct that was inciting another to harm the service user.

8. Put shortly, the arguable error of law was holding the filming of the service user, the private sharing of that film with one other person and the comments made about the service user in that film by those two persons, none of which actions were known,

or were intended to be known, to the service user, as conduct that 'harmed' the service user. The point was said to be encapsulated in whether conduct that is unknown to the child or vulnerable person, and does not otherwise harm that person (e.g. theft from a vulnerable adult which they are in fact unaware of (*SA v ISA* [2013] UKUT 93 (AAC); [2014] AACR 21)), may be said as a matter of law to be conduct that harms the person or is likely to harm that person, or which if repeated would harm or be likely to harm the person, if the conduct is unknown to the person (and would not otherwise harm that person).

9. Second, it was arguable that the decision was in error of law as being a decision which was disproportionate given: (i) the one-off nature of the actions of NC on or about 19 February 2021, (ii) that the video was shared privately with one other person and was not intended to be shared with anyone else, (iii) NC not being the instigator of the potentially abusive comments during the sharing of the video, (iv) the lack of any harm to which the service user came from the filming at the time (as she was unaware of it), (v) the remorse expressed by NC, (vi) NC's history of working in the care sector without incident (other than the actions relied on by the DBS), and (vii) the lack of risk of NC repeating such actions in the future.

10. In giving permission to appeal Judge Wright stated that it would assist in relation to both grounds of appeal if the parties could address the effect of section 58 of the SVGA. It was suggested that on the face of the wording in section 58, which was not seemingly tied to 'regulated activity' in section 5 of the SVGA, it may be arguable that it precluded the DBS from relying on NC sharing the video with her (then) partner and discussing the video with him as both were acts or activities which took place (per section 58(2)) in the course of a personal relationship.

11. Judge Wright, however, refused NC permission to appeal on the grounds she advanced. NC had not disputed any of the facts on which the DBS's decision was based and she raised no error of law arguments, save insofar as her arguments about it being a one-off and about it being a private sharing of the video with her partner in which she intended no harm, were encompassed in the grounds on which permission to appeal had already been given.

Relevant law

12. Section 2 of the SVGA provides that the DBS must maintain the children's barred list and the adults' barred list. Subsections (2) and (3) provide, respectively, that Part 1 of Schedule 3 of the SVGA applies for the purpose of determining whether an individual is included in the children's barred list and Part 2 of Schedule 3 applies for the purpose of determining whether an individual is included in the adults' barred list.

13. Section 3 of the SVGA deals with the consequences of a person being placed on either barred list, and provides so far as is relevant to England and Wales as follows:

> "**Barred persons**
>
> 3.-(1) A reference to a person being barred from regulated activity must be construed in accordance with this section.
>
> (2) A person is barred from regulated activity relating to children if he is—
>
> (a) included in the children's barred list….

(3) A person is barred from regulated activity relating to vulnerable adults if he is—

(a) included in the adults' barred list…"

14. Although this is not in issue on this appeal, the Upper Tribunal's appellate jurisdiction is provided for under section 4 of the SVGA, which provides (insofar as relevant) as follows:

"**Appeals**
4.-(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
(b) a decision…..to include him in 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…"

15. We deal with section 6 of the SVGA under our analysis of the grounds below.

16. Section 58 of the SVGA is a key provision in this appeal. It sets out the following.

"**Family and personal relationships**

58.-(1) This Act does not apply to any activity which is carried out in the course of a family relationship.

(2) This Act does not apply to any activity which is carried out—

(a) in the course of a personal relationship, and

(b) for no commercial consideration.

(3) A family relationship includes a relationship between two persons who—

(a) live in the same household, and

(b) treat each other as though they were members of the same family.

(4) A personal relationship is a relationship between or among friends.

(5) A friend of a person (A) includes a person who is a friend of a member of A's family.

17. Paragraphs 3, 4, 9 and 10 of Schedule 3 to the SVGA deal with what constitutes "relevant conduct" in respect of children and adults. Those paragraphs, insofar as relevant on this appeal, provide as follows:

"3 (1) This paragraph applies to a person if-

(a) it appears to DBS] that the person

(i) has (at any time) engaged in relevant conduct, and

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

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

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

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

(a) it is satisfied that the person has engaged in relevant conduct,

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

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

4 (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.

9 (1) This paragraph applies to a person if—

(a) it appears to DBS that the person

(i) has (at any time) engaged in relevant conduct, and

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

(b) DBS] proposes to include him in the adults' barred list.

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

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

(a) it is satisfied that the person has engaged in relevant conduct,

(aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and (b) it is satisfied that it is appropriate to include the person in the list.

10 (1) For the purposes of paragraph 9 relevant conduct is—

(a) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;

(b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;

(c) conduct involving sexual material relating to children (including possession of such material);

(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;

(e) conduct of a sexual nature involving a vulnerable adult, if it appears to DBS that the conduct is inappropriate.

(2) A person's conduct endangers a vulnerable adult if he—

(a) harms a vulnerable adult,

(b) causes a vulnerable adult to be harmed,

(c) puts a vulnerable adult at risk of harm,

(d) attempts to harm a vulnerable adult, or

(e) incites another to harm a vulnerable adult."

18. The following decisions set out the bounds of the jurisdiction of the Upper Tribunal in exercising its appellate jurisdiction on DBS cases. First, the appropriateness of a barring decision is not a matter for the Upper Tribunal on appeal. Second, for an appeal to succeed it needs to be shown, on the balance of probabilities, that the DBS made either a material error of law or a material error of fact in its decision: *R v (RCN and others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin) (at paragraph 104) and *PF v DBS* [2020] UKUT 256 (AAC); [2021] AACR 3. Third, if it is argued that a decision to include a person on a barred list is disproportionate to the relevant conduct or risk of harm relied on by the DBS, the Upper Tribunal must afford appropriate weight to the judgement of the DBS as the body enabled by statute to decide appropriateness: *SA v SB & RCN* [2012] EWCA Civ 977; [2013] AACR 24. Fourth, what needs to be considered is not the terms of the decision letter alone but the whole basis for the decision as evidenced on the papers the DBS considered in coming to its decision: *VT –v- ISA* [2011] UKUT 427 (AAC) (at paragraph 36).

19. The primacy of the DBS's role as decision maker under the SVGA has been underscored and reaffirmed by the Court of Appeal in *DBS v AB* [2021] EWCA Civ 1575: see in particular paragraph [43] of that decision. The Court of Appeal in *AB* have also settled that there is a very limited basis on which the Upper Tribunal can

direct that a person be removed from a Barred List under section 4(6) of the Act. The duty to direct removal only arises in circumstances where "that is the only decision the DBS could lawfully reach in the light of the law and facts as found by the Upper Tribunal" (*SB* at para. [73]).

20. The only other piece of case law we need to address is the Upper Tribunal's decision in *SA v ISA* [2013] UKUT 93 (AAC); [2013] AACR 21. This a decision which decides that theft can constitute relevant conduct under the SVGA. It is what the Upper Tribunal says in *SA* about "relevant conduct" and "harm" which is important, and we set out the key passages from *SA* on this. We emphasise at this stage what is said in paragraphs [20]-[21] of *SA*.

> "17. There is, however, force in Mr Baldwin's submission that mere loss o[f] property as a result of theft does not amount to harm for the purposes of the 2006 Act. The natural reading of paragraph 10(2) is that "conduct endangers a vulnerable adult" only if there is harm, or a risk of harm, to the person of a vulnerable adult and not to his or her property. But if the loss of property does not amount to harm, it may nonetheless result in it…..
>
> 18. However, it is not necessary to prove that there has been harm. Paragraph 10(1)(a) has the effect that conduct which has endangered a vulnerable adult or was *likely to* endanger a vulnerable adult is "relevant conduct". Moreover, by virtue of paragraph 10(2)(c), a vulnerable adult is endangered if put "at risk of harm". Thus, if conduct creates a risk of harm, then by definition the conduct endangers a vulnerable adult. If the conduct endangers a vulnerable adult then by definition it is relevant conduct and the person who has engaged in such conduct is liable to have their name put on the barred list.
>
> 19. It seems to us to be beyond doubt that theft by a carer from a vulnerable adult for whom he or she is caring is *likely* to cause, or at least *risks* causing, deep distress to the vulnerable adult should the vulnerable adult discover it, even if such conduct does not always actually cause harm. It is not the mere loss of property or even the fact that there is a breach of trust that is important; it is the nature of the breach of trust. Where a person is vulnerable and being cared for for precisely that reason, any breach of trust is more serious simply because the need for trust is greater. It is for this reason that we are satisfied that the ISA did not err in considering that the thefts from Mrs M were "relevant conduct" without finding that Mrs M had in fact suffered distress. The same reasoning applies to the thefts from Mr X on the ISA's finding that they had occurred.
>
> 20. It might be argued that there would be no risk of harm to a vulnerable adult who, by reason of mental incapacity, would be oblivious to any theft. However, paragraph 10(1)(b) has the effect that "relevant conduct" includes conduct which "if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him". Repeating the conduct in relation to another vulnerable adult not suffering from such mental incapacity would create a risk of harm and accordingly the conduct in respect of the mentally incapacitated victim would be "relevant conduct".

> 21. It follows from our reasoning and from paragraph 10(1)(b) that the housing benefit offences could also be "relevant conduct" in the present case. If the dishonest conduct against the local authority in the housing benefit claims were to be repeated against a vulnerable adult, it would be likely to cause distress."

The DBS's decision in more detail

21. The final decision letter sent to NC reads, in material respects, as follows:

> "We are satisfied that you meet the criteria for regulated activity because of your employment as a Healthcare Assistant with Interact Medical.
>
> We have reviewed all the information we hold and are satisfied of the following:
>
> That on, or around, 19 February 2021: You sent videos of a vulnerable adult, [name redacted], to your colleague, [name redacted]; and You actively engaged in an exchange of messages with [your colleague] through Facebook messenger which were derogatory in nature. The DBS is satisfied you have engaged in conduct which harmed or could harm children and vulnerable adults. This is because you have admitted to filming a vulnerable adult without her knowledge or permission and sending the videos via Facebook messenger to your partner / colleague.
>
> The DBS is satisfied that your actions were for your personal entertainment purposes having noted the language used in the exchange of messages that accompanied the videos and your admission that your conduct was that of 'banter' albeit wholly inappropriate. The DBS are satisfied that you instigated the exchange of messages with your partner during which you were an active participant in the conversation; you did so whilst on duty in regulated activity and therefore have not demonstrated behaviours consistent with those expected of a person in your role.
>
> The DBS is satisfied that during the exchange of messages, your partner made a number of comments in respect of abusing the vulnerable adult which you did not challenge or report. Whilst there is no evidence that you had any reason to believe that your partner made the comments with the intention of engaging in abuse, you found the comments amusing. It is acknowledged that there is no evidence to suggest any physical abuse occurred prior to or after the exchange of messages however this does not serve to diminish the seriousness of your actions which you have sought to justify as 'banter'. The DBS have concerns that you did not challenge your partner on his statements made which raises concerns in respect of your ability to safeguard and recognise risk. In addition there are concerns that you have abused your position and the vulnerabilities of a person in your care for yours and your partner's entertainment.
>
> The DBS acknowledge that the images were sent privately to your partner and were isolated to one exchange of messages, however this does not make your behaviour any less harmful. You instigated the conversation, sharing images of a service user in a vulnerable state, being asleep, and made no attempts to stop the conversation when your partner made

> abusive comments. Your action in sharing the images had potential to incite your partner to behave in a similar manner and your failure to challenge him on his comments made suggests that your actions had potential for harm to be caused to a vulnerable adult.
>
> Whilst the vulnerable adult appears to have been unaware of the incident, should similar conduct be repeated in respect of another who was aware, or in the presence of other vulnerable adults, it is likely to cause significant emotional harm.
>
> The DBS have concerns that you may film vulnerable adults in the future or engage in conversations of a derogatory nature involving vulnerable adults for personal entertainment. In doing so, there are concerns you may incite others to engage in a similar manner and fail to protect those in your care from the risk of further abuse. Whilst you have acknowledged your conduct was inappropriate, you have failed to fully address the concerns raised by the DBS and therefore it appears likely that you may engage in such conduct again in the future given your explanation of the situation as 'banter', suggesting you have minimised the seriousness of your conduct.
>
> Given the potential for significant harm, the DBS are satisfied that it is appropriate to include your name in the Adults' Barred List.
>
> The behaviour is transferrable to regulated activity with children where there may be opportunities for you to film and discuss children in a derogatory manner. Further, you may not identify or report safeguarding concerns, placing them at risk of significant harm. It therefore is appropriate to include your name in the Children's Barred List."

22. We have underlined one passage in the final decision letter as it relates to the first ground of appeal and whether the DBS erred in law in its approach to whether what NC did on 19 February 2021 amounted to "relevant conduct" under the SVGA.

Discussion and conclusion

Section 58 SVGA

23. However, we deal first with section 58 of the SVGA and whether it precluded the DBS from relying on NC sharing the film with her colleague/partner and engaging in 'banter' with him about the vulnerable adult. We do so because NC's arguments under (we think) both grounds of appeal relied four-square on section 58 as, in effect, meaning that the DBS could only rely on the act of NC filming the vulnerable adult. NC's argument was, as we understood it, that as a result the DBS's erred in law in its approach both to relevant conduct and to the proportionality of barring her because the DBS took into account matters that could not in law be taken into account, namely the sharing of the video and the discussion she had with her partner about that video.

24. We have no hesitation in rejecting this argument and NC's reliance on section 58 of the SVGA. In our judgment, section 58 does not preclude from the consideration as to what is "relevant conduct" any 'activity' which is carried out in the course of a family relationship or a personal relationship. We say this for the following reasons.

25. First, and shorn of any consideration of the statutory words or other provisions within the SVGA, on the face of it to read section 58 as precluding the DBS from

taking account of any activity which is carried out in the course of a family or personal relationship would very significantly undermine the safeguarding effect of the SVGA. For example, but one which we stress has nothing to do with this case, if a parent were either convicted or found on the balance or probabilities to have very seriously harmed their children by hitting them or sexually abusing them, that would be an act or activity which was carried out in the course of a family relationship and so could not be relied on by the DBS. Such a result is, we consider, one which plainly runs contrary to the general purpose of the SVGA and would require very clear words to mandate it. No such clear wording appears in section 58.

26. Second, the wording of section 58 about the Act not applying to any activity which is carried out in a family or personal relationship is not on the face of section 58 expressly tied, or made applicable, to the definitions of "relevant conduct" found elsewhere in the SVGA. If anything (see further our third point below), it may be relevant to what constitutes "regulated activity". There is therefore no statutory requirement to read section 58 as limiting the matters or evidence that may be taken into account in deciding whether "relevant conduct" has been established under paragraphs 4 or 10 of Schedule 3 to the SVGA. Moreover, nothing in, for example (and to make relevant to the example we have used in the immediately preceding paragraph), paragraph 4 of Schedule 3's definition of relevant conduct in relation to children limits the conduct that may be taken into account to conduct which takes place outside a family relationship. Indeed, we struggle to see how paragraph 4 in Schedule 3 can be said to be so limited, even impliedly, given its lack of any reference to section 58 and given, for example, that on the face of it a parent who has sexually abused one of their children would come clearly within the terms of paragraph 4(1)(e) of Schedule 3 to the SVGA.

27. Third, other aspects of the SVGA show in our judgment that section 58 is not relevant to whether relevant conduct has occurred. As we have noted above, section 58 does not refer to any other sections in the SVGA and is about activities rather than conduct. Importantly, and relevantly, section 6 of SVGA is concerned with who a "regulated activity provider" is. Section 6 provides the following:

> "**Regulated activity providers**
>
> 6.-(1) A reference to a regulated activity provider must be construed in accordance with this section.
>
> (2) A person (P) is a regulated activity provider if—
>
> (a) he is responsible for the management or control of regulated activity,
>
> (b) if the regulated activity is carried out for the purposes of an organisation, his exercise of that responsibility is not subject to supervision or direction by any other person for those purposes, and
>
> (c) he makes, or authorises the making of, arrangements (whether in connection with a contract of service or for services or otherwise) for another person to engage in that activity.
>
> (3) A person (P) is also a regulated activity provider if section 53(4) (fostering) so provides.
>
> (4) A person (P) is also a regulated activity provider if he carries on a scheme—

> (a) under which an individual agrees with P to provide care or support (which may include accommodation) to an adult who is in need of it, and
>
> (b) in respect of which a requirement to register arises—
>
> (i) in relation to England, under section 10 of the Health and Social Care Act 2008, or
>
> (ii) in relation to Wales, under Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016.
>
> (5) P is not a regulated activity provider if he is an individual and the arrangements he makes are private arrangements.
>
> (6) Arrangements are private arrangements if the regulated activity is for, or for the benefit of, P himself.
>
> (7) Arrangements are private arrangements if the regulated activity is for, or for the benefit of, a child or vulnerable adult who is—
>
> (a) a member of P's family;
>
> (b) a friend of P……
>
> (11) "Family" and "friend" must be construed in accordance with section 58."

28. We have underlined parts of section 6 as in our judgment those underlined subsections provide the 'tie' with regulated activity and section 5 (see paragraph 10) above. More importantly, they also link to section 58 and make plain, in our judgment, that section 58 is distinguishing activities carried out, per section 6(5) and (7) within a (private) family or (private) personal relationship from those carried out by regulated activity providers. This is underscored by the effect of section 6(3) and section 53(1) and (4) which, in effect, bring private foster parenting arrangements sack into "regulated activity" notwithstanding the terms of section 58.

29. Fourth, and following on from the last point, reading section 58 as being unrelated to relevant conduct does not rob that section of any useful content. In our judgment, what section 58 is providing for is that the SVGA, and any barring decision made under it, does not affect or prevent any person, including a person placed on one or both of the Barred Lists, from carrying out activities in a family or personal relationship. By way of example, the barring decision in this case does not prevent NC from caring for a vulnerable family member who lives in her household. This accords with the paragraph 157 of the Explanatory Notes to the SVGA and the example those Notes give that "a person included in the children's barred list could look after his grandchildren". We should add that we are mindful of the limited value that such Explanatory Notes may have in interpreting the meaning of statutory provisions: per paragraph [30] of *R(O) v SSHD* [2022] UKSC 3; [2023] AC 255. The example of caring for grandchildren not being precluded which is given in the Explanatory Notes does no more than confirm our view about what the wording in section 58 is concerned with.

30. NC had a supplementary argument about section 58, which we also reject. She argued that "section 58….imparts an Article 8 proportionality test into purported regulated activities which concerns private correspondence between two individuals in the course of a personal relationship". We consider that the reference in the

argument to 'regulated activities' must have been intended to read "regulated conduct" as it is not disputed that NC met the 'regulated activity' test in section 5 and Schedule 4 of the SVGA because she was employed as a Healthcare Assistant for Interact Medical. Furthermore, although the sharing of the videos of the vulnerable adult was carried out whilst NC was engaged in regulated activity, the critical issue is whether that sharing amounted to relevant conduct. Section 3 of the SVGA bars a person from working in regulated activity relating to children and/or adults, but it is the 'harmful' relevant conduct which provides the foundation for preventing a person from working in regulated activity.

31. In any event, there is no foundation for section 58 importing any proportionality test into the tests for barring found in paragraphs 3(3) and 9(3) of Schedule 3 to the SVGA because, for the reasons given above, section 58 has nothing to do with those tests.

32. NC's grounds of appeal therefore have to be considered without any support from section 58 of the SVGA as that section has no relevance to either ground. For completeness, the DBS did not err in law in taking account of NC's sharing of the videos of the vulnerable adult with her partner and her discussions with her partner about the vulnerable adult when coming to its decision of 21 October 2021.

Ground 1 - Relevant conduct

33. This ground has no merit for the short reason that it left out of account, or did not sufficiently focus on, the parts of the definition of "relevant conduct" in Schedule 3 of the SVGA which provide that relevant conduct is "conduct which, if repeated against or in relation to a child/vulnerable adult, would endanger that child/vulnerable adult or would be likely to endanger him": per paragraphs 4(1)(b) and 10(1)(b) of Schedule 3. On the basis of the words we have underlined in the DBS's decision letter set out in paragraph 21 above, then DBS made its decision, at least in part, on the basis that even if the vulnerable adult did not in fact suffer any harm as a result of the filming, sharing of the film and 'banter' about her between NC and her partner, such actions if repeated against or in relation to another vulnerable adult (or child) would be likely to harm that vulnerable adult (or child): see, relevantly, paragraphs [20]-[21] of *SA*. In so doing, the DBS directed itself properly on the law.

34. Moreover, we can find no warrant for construing the 'if repeated' conduct here narrowly as being limited to conduct of which the vulnerable adult (or child) was unaware. We note that in fact the reason what NC did on or about 19 February 2021 came to light was because, for reasons we on not need go into, NC's employer became aware of the filming of the vulnerable adult by NC, the sharing of those videos with NC's partner and their conversations about the vulnerable adult. Moreover, this was reported to the care home and they discussed what had occurred with the vulnerable adult's husband (see page 43). It is therefore possible that the vulnerable adult did became aware of what occurred and, if she had, it was conduct which was "likely to [harm] a vulnerable adult": per paragraph 10(1)(a) and (2)(a) of the SVGA: and see further paragraphs [18]-[19] of *SA*.

35. Be all of this as it may be, the DBS's decision on its face was founded not on the vulnerable adult in fact being harmed or that the conduct was likely to harm her. The decision was based on it being "conduct which, if repeated against or in relation to a vulnerable adult [or child] would [harm] the vulnerable adult [or child] or put a vulnerable adult [or child] at risk of [harm], or would be likely to [harm] the vulnerable adult [or child] or would be likely put a vulnerable adult [or child] at risk of [harm]".

Given the test can be satisfied if the conduct, if repeated, on the basis of the likelihood of it putting a vulnerable adult or child at risk of harm, this is broad enough in our judgment, on the fact of this case, to cover the likelihood of the other vulnerable adult (or child) waking to see they are being filmed or being awake with their eyes closed and therefore hearing the derogatory comments (i.e. 'the banter') being made about them. In both circumstances, the filming would be being done without the consent of the vulnerable adult (or child) and would be breach of their privacy and dignity. The likelihood of them being put at risk of harm if the conduct was repeated is obvious.

36. This is sufficient to dispose of the first ground of appeal. The DBS were entitled to be satisfied that NC had engaged in relevant conduct in relation to vulnerable adults and children under, respectively, paragraphs 10(1)(b) and 4(b) of Schedule 3 to the SVGA.

Ground 2 - Proportionality

37. We also do not consider that the DBS acted disproportionately in being satisfied that it was appropriate to include NC on both barred lists under paragraphs 3(3)(b) and 9(3)(b) of Schedule 3 to the SVGA.

38. Our jurisdiction here is a narrow one. The decision as to whether or not it is appropriate to include NC on either barred list is not a matter for us: section 4(3) of the SVGA. Moreover, given the SVGA provides that the DBS must include the person on a barred list if it is satisfied that the person has engaged in relevant conduct, that they have reason to believe that the person has (or is or might in the future) be engaged in relevant regulated activity, and it is satisfied it is appropriate to include the person in the list, the proportionality analysis cannot extend to considering whether a less intrusive means could have been used: see paragraph [20] of *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39; [2014] AC 700. The only outcome available under the SVGA, which the DBS is required to do if the three conditions described earlier in this paragraph are met, is to include the person on the barred list (or lists). The SVGA does not admit of any lesser outcome. In these circumstances, it seems to us that the argument that the DBS acted disproportionately in placing NC on both lists reduces to a *Wednesbury* argument about the DBS, for example, having taken account of all relevant matters and not having arrived at a decision that no rational decision maker would have arrived at on the evidence. Moreover, in considering any such argument we must bear in mind that we must afford appropriate weight to the judgement of the DBS as the body enabled by statute to decide appropriateness: per *SA v SB & RCN* [2012] EWCA Civ 977; [2013] AACR 24.

39. The starting point on the facts of this case, moreover, is that NC had engaged in relevant conduct as described above. Furthermore, the decision letter when read with the "Barring Decision Process" document on pages 49-63 show in our judgment that the DBS had regard to NC's representations, took them into account and weighed them against the other relevant evidence. The points referred to under the second ground of appeal - (i) the one-off nature of the actions of NC on or about 19 February 2021, (ii) that the video was shared privately with one other person and was not intended to be shared with anyone else, (iii) NC not being the instigator of the potentially abusive comments during the sharing of the video, (iv) the lack of any harm to which the service user came from the filming at the time (as she was unaware of it), (v) the remorse expressed by NC, (vi) NC's history of working in the

care sector without incident (other than the actions relied on by the DBS), and (vii) the lack of risk of NC repeating such actions in the future – are in our final analysis no more than merits points which it was for the DBS to evaluate in coming to its decision and to which it did have sufficient regard: see for example the sixth paragraph in the decision letter set out in paragraph 21 above. Once this point is reached, we cannot conclude that the decision to place NC on both barred lists was a decision which no reasonable decision maker could have arrived at. For the reasons the DBS gave, the decision was one which was rationally open to the DBS on the evidence.

40. NC argued specifically that the conversations between her and her partner had been taken out of context. Seen in the proper context they were no more than "light-hearted" comments between a couple about work in which no harm was in fact done to the vulnerable adult. It is argued that "significant weight" should be given to NC's assertion that what was said was no more than "banter". This last argument betrays the weakness in this argument under an error of law ground. The weight to be accorded to the evidence is classically for the primary decision maker (here the DBS). The DBS took account of NCs argument about the conversations being no more than "banter". It was entitled to conclude, for the reasons it gave, that to describe the conversations in this way was to downplay the seriousness of what had occurred and what had been discussed, and itself gave rise to a concern about the risk of NC repeating such conduct in the future given her downplaying of the seriousness of what she had done. It is not for us under an error of law ground to re-evaluate this evidence and come to our own view about the weight to be accorded to it.

41. We address finally an argument made on behalf of NC under this ground of appeal about Article 8 of the European Convention on Human Rights ("ECHR") in the context of the proportionality of the DBS's decision to bar NC from working in regulated activity with vulnerable adults and children. There is no dispute that the DBS considered NC's Article 8 rights in its decision, where it said relevantly:

> "Consideration has been given to your rights as outlined in Article 8 of the European Convention on Human Rights. It is noted that you have been employed in a number of care positions; it is reasonable to expect that during this time you have gained skills and experience relevant to employment in this field, your ability to utilise these to further your career will be adversely affected as a result of a bar. This in turn may impact on your future earning potential.
>
> However, the DBS are satisfied that you pose a risk of harm to vulnerable groups in that you may engage in conversations of a derogatory nature relating to those in your care and fail to identify and act on potential safeguarding concerns.
>
> There are currently no safeguards in place from other agencies; including your name in the lists is therefore necessary to protect vulnerable groups in the future. Given the potential for both emotional and physical harm, the need to safeguard outweighs your personal interests and the DBS is satisfied that including your name in both the Adults' and Children's Barred List is a proportionate response."

42. We struggled to understand NC's argument here, but it appeared to be that in carrying out this Article 8 balance the DBS had not had regard to the private nature of

the filming and conversations between NC and her partner and the protections Article 8 afforded to those aspects of NC's private life. The submission in the end argued that it was not proportionate under Article 8 to use this private information to reach a barring decision. We do not consider this argument has any merit, insofar as it can arise under the grounds on which permission was given and has a status independent of section 58 (see paragraph 30 above).

43. Even if it is to be assumed (which we find very doubtful) that NC was not acting in the course of her employment when she filmed the vulnerable adult and spoke to her partner about the filming (and we note here that one of NC's other arguments was that the conversations took place in part because both she and her partner worked on the same place of work and knew the vulnerable adult, and they were taking about her in that context), and it is assumed to be arguable that the filming and sharing of the film was all done in NC's 'private life' (or is about her 'correspondence') under Article 8, given the serious and important nature of this evidence we can find no case law that suggests that such evidence must be ignored by the DBS once it has been disclosed to it under the SVGA. Moreover, it seems at the very least odd that the product of the unwanted filming of a person, which prima facie is a breach of that person's private life, becomes the wrongfully filming person's private life or correspondence. In any event, even if such an argument is tenable under Article 8(1), in our judgment any interference by the DBS in NC's private life or correspondence (by relying on the evidence of her filming the vulnerable adult and talking about that vulnerable adult with her partner) would be amply justified under Article 8(2) as being provided for under the SVGA and because it is "necessary in a democratic society in the interests of….public safety,….for the protection of health…, or for the protection of the rights and freedoms of others"

Conclusion

44. For all of these reasons, this appeal is dismissed.

Approved for issue by

Stewart Wright
Judge of the Upper Tribunal

Michele Tynan
Member of the Upper Tribunal

Christopher Akinleye
Member of the Upper Tribunal

On 7 February 2024