IN THE UPPER TRIBUNAL **Appeal No.: UA-2021-002123-V**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the Disclosure and Barring Service

Between:

EB

Appellant

- v –

Disclosure and Barring Service

Respondent

NOTE THAT, on 13 July 2021, Upper Tribunal Jacobs ordered that –

> **No one shall publish or reveal the name or address of the person referred to in the papers as KK or reveal any information which would be likely to lead to the identification of either him or any member of his family.**

That Order applies to the person referred to in this decision as KK. Any breach of the Order is liable to be treated as a contempt of court and punished as such.

Signed on the original on behalf of the Tribunal on 3 May 2023

Before: **Deputy Upper Tribunal Judge Rowland**
Mr Brian Cairns
Ms Josephine Heggie

Hearing date: 2 and 3 March 2023
Decision date: 3 May 2023

Representation:

Appellant: Mr Joseph Chiffers of Counsel, instructed by Lei Dat & Baig, solicitors
Respondent: Mr Simon Lewis of Counsel, instructed by DLA Piper, solicitors

DECISION

The appeal is allowed on the ground that the Respondent made mistakes of fact when deciding on 9 November 2020 to include the Appellant in the Adults' Barred List and the Children's Barred List.

The Respondent is directed to remove the Appellant from both lists.

REASONS FOR DECISION

1. This an appeal, brought by the Appellant under section 4 of the Safeguarding Vulnerable Groups Act 2006 (hereinafter "the 2006 Act") with permission granted by Upper Tribunal Judge Jacobs, against the decision of the Respondent, the Disclosure and Barring Service (hereinafter "DBS"), dated 9 November 2020, whereby the Appellant was included in both the Children's Barred List and the Adults' Barred List that are maintained by DBS under section 2 of the 2006 Act.

Page numbers

2. Each of the parties provided us with a bundle of documents and a separate skeleton argument to which were attached various authorities. The Respondent's formal response to the appeal did not get into either of the main bundles of documents but was attached to the Respondent's skeleton argument. The Page references in this decision are either to the 347-page DBS bundle of documents "*DBS*" (of which at least 131 pages are duplicates) or to the 95-page Appellant's bundle of documents "*App*". For convenience, we refer to the DBS bundle, except where a document appears only within the Appellant's bundle.

Barring under the 2006 Act

3. By section 3 of the 2006 Act, a person included in the Children's Barred List or the Adults' Barred List is barred from relevant "regulated activity". This broadly has the effect that the person cannot be lawfully employed, or volunteer, as a person providing personal care to children or vulnerable adults, as the case may be (see section 5 and Schedule 4).

4. Schedule 3 makes provision for DBS to include people in the Lists. Paragraphs 3 and 4 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 vulnerable adult or is likely to endanger a vulnerable adult;
(b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
(c) …;
(d) …;
(e) ....
(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) …, or
(e) ….
(3) ….
(4) ….
(5) ….
(6) ….”

Paragraphs 9 and 10 of Schedule 3 make what is effectively identical provision in respect of the Adults' Barred List. In particular, paragraph 10(1)(b) provides that, for the purposes of paragraph 9, “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”. Thus, relevant conduct in relation to a child may also be relevant conduct in relation to an adult and *vice versa*.

5. Section 35 has the effect that a “regulated activity provider” who dismisses an employee because it thinks that the employee has engaged in “relevant conduct” within paragraphs 4 or 10 of Schedule 3 must provide DBS with prescribed information. This is known as a referral and a referral form is used to collect the information. Supporting evidence must be sent with the referral form. This tends to consist of recruitment and disciplinary process documents.

The background to this appeal

6. From 17 April 2018 until 9 March 2020, the Appellant, who was in her early 40s, was employed as a waking night support worker in a small children's home linked to a school providing education and care for children with complex needs, including learning difficulties, autism, sensory difficulties and challenging behaviour. There were four children in the home at the time of the first allegation with which we are concerned, but apparently only two at the time of the second allegation. There were generally two waking night support workers on duty each night. They had household tasks, such as cleaning and preparing food for the next day, to complete while the children were settled.

7. KK was one of the children who lived in the home. He was aged 13 at the time of the first allegation and 14 at the time of the second. The referral form (*DBS* p.35) says of him –

> "Extremely vulnerable, previous experience of domestic violence within the family, possible trauma and attachment issues, learning disability, autism.
>
> At the time of the concern he was constantly regurgitating food/drink due to unknown psychological issues around food/drink and possible OCD behaviour."

8. On 12 January 2020, two other members of staff raised a concern regarding the Appellant's care of KK. The two complainants were asked to write statements. The Appellant, who had gone home, was contacted, called in and informed of the allegation. She was suspended and she, too, was asked to write a statement. After each member of staff had written her statement, the registered manager of the home, AL, spoke to her and made a note of what she said. He then reviewed the evidence and decided that the allegation that "on the morning of 12/01/20 EB forcefully poured Lemonade into KK mouth and then held her hand over his mouth to prevent him spitting/vomiting it out" should be referred to a disciplinary hearing. The meeting took place on 9 March 2020 and the outcome was that the Appellant was summarily dismissed for gross misconduct. It was recorded that the allegation that had been considered was that "on the morning of 12/01/20 EB forced KK to drink Lemonade and then held his head and placed her hand over his mouth to prevent him vomiting the drink back up". The Appellant appealed but her appeal was dismissed.

9. While that appeal was pending, the school business manager sent a referral form to DBS with the disciplinary process documents and the documents relating to the Appellant's application for employment in the home. The referral was only in respect of the grounds of dismissal but the documents included references to two previous concerns raised against the Appellant, one in respect of which it had been found that there was insufficient evidence to support it and the other, "regarding EB's conduct and response to a colleague while supporting KK" on 16 May 2019, that "was investigated and resolved through supervision" (*DBS* p.40).

10. On 23 July 2020, DBS wrote to the Appellant to tell her that it was "minded to bar" her by including her in both the Children's Barred List and the Adults' Barred List and it invited representations in the light of its reasons (*DBS* pp. 19-23). These included that both the allegation in relation to the incident on 16 May 2019 and the grounds upon which the Appellant had been dismissed appeared to be made out on the balance of probabilities. The Appellant duly provided representations and two statements from other members of staff (*DBS* pp. 302-310), but DBS was unmoved and included the Appellant in both Lists in its "final decision" (*DBS* pp. 311-316).

11. The Appellant now appeals against that decision. In her amended grounds of appeal (which sensibly doubled as Mr Chiffers' skeleton argument, although it was not signed and he added some law to it to make a third version for the hearing), the Appellant asserted that DBS "made errors of fact and omitted important information in reaching their decision" and makes thirteen points in support of that assertion.

12. Upper Tribunal Judge Jacobs gave permission to appeal on 5 October 2021 "because the amended grounds of appeal raise numerous issues of fact on which the appellant has a reasonable prospect of success" *(DBS* p.343).

The nature of this appeal

13. Section 4 of the 2006 Act 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."

14. Because of the way that both counsel had put their cases in their written submissions, we raised with them at the beginning of the hearing whether they accepted that an appeal under section 4(2)(b) on the ground that DBS had made a mistake of fact was an appeal by way of rehearing (as in an appeal from a magistrates' court to the Crown Court), rather than an appeal by way of review, so that, if the Tribunal made different or additional findings of fact that were material, it would necessarily find that DBS had made a mistake of fact even though it might accept that DBS had been entitled to make the findings it did. As we had suspected would be the case, Mr Lewis was not prepared to accept that proposition, but Mr Chiffers was. We therefore heard argument on the point.

15. During the course of argument, Mr Lewis accepted that most of the cases in which the Court of Appeal, the Administrative Court and the Upper Tribunal have considered the scope of appeals under section 4 have been concerned with the effect of section 4(3), rather than specifically with the nature of an appeal brought under section 4(2)(b).

16. *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575; [2022] 1 W.L.R. 1002 may now be regarded as the leading authority on the effect of section 4(3). In that case, Lewis LJ, with whom Macur and Moylan LJJ, agreed, also considered what, in the light of section 4(3), amounted to a finding of fact for the purposes of section 4. He said at [55] that the Upper Tribunal needs "to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness." Section 4(3) has the effect that the

assessment of appropriateness is excluded from the Tribunal's jurisdiction, save to the extent that it is based on a separate mistake of fact or is wrong in law. Although section 4(6)(a) permits the Upper Tribunal to direct DBS to remove a person from a List, Lewis LJ held at [73] that it may do so only "where that is the only decision that the DBS could lawfully reach in the light of the law and the facts as found by the Upper Tribunal". At [75], he left open the question whether the Upper Tribunal could also do so where its decision is based on a concession by DBS.

17. Mr Lewis also drew our attention to *AB v Disclosure and Barring Service* [2022] UKUT 134 (AAC). In that case, the appellant had been included in the Children's Barred List under paragraph 5 of Schedule 3 on the basis that, although he had not engaged in "relevant conduct", he nonetheless posed a risk of harm. Having considered the Court of Appeal's decision that we have just mentioned, the Upper Tribunal concluded at [49] to [52] that the question whether a person posed a risk was a question of fact within the Upper Tribunal's jurisdiction, whereas the assessment of the risk was part of the decision on appropriateness and so was not (unless made in error of law). It also pointed out at [41] that the same issue arises when a case is considered under paragraphs 3 and 4 on the basis that conduct is "likely to endanger a child" or "puts a child at risk of harm". Perhaps such issues are capable of raising points of law as well as being questions of fact, but we agree with the necessary implication of the Upper Tribunal's decision which is that the question whether a person has engaged in relevant conduct is not excluded from the Upper Tribunal's jurisdiction by section 4(3), even when paragraph 4(2)(c) is relied upon.

18. We add that we consider that the structure of the legislation implies an intention that a strictly literal approach should be taken to whether behaviour amounts to "relevant conduct" – or, in the context of paragraph 5, whether a person poses a risk of harm – and that the flexibility necessary to avoid injustice is to be achieved through the assessment of appropriateness, to which section 4(3) applies. However, there is no discussion in the decision about the Upper Tribunal's general power to determine an appeal brought on the ground that DBS's decision was based on a mistake of fact.

19. Nor was there any such discussion in *SV v Disclosure and Barring Service* [2022] UKUT 55 (AAC), upon which both counsel relied in their skeleton arguments and Mr Lewis relied at the hearing. In that case, the Appellant was unrepresented at the hearing of his appeal but had previously been represented and it appears that a number of legal arguments had been raised in the grounds of appeal. One was whether DBS had been entitled to reopen the case after it had told the appellant that he would not be barred and, indeed, the Upper Tribunal sought further written submissions on that issue after the oral hearing in that case. The appellant himself simply denied that he had acted in the way that DBS had found him to have acted. Having decided that DBS had been entitled to reopen the case, the Upper Tribunal turned to the question whether DBS had made a mistake on a point of law or a finding of fact on which the barring decision was made. After setting out DBS's findings, it said at [69] –

> "Given the limited jurisdiction of the Upper Tribunal under the 2006 Act, we need to consider not whether we would have made the same findings ourselves if conducting a full merits review, but rather whether DBS was entitled to make those findings on the evidence before it, or whether its decision was based on a mistake of fact or a mistake on a point of law."

It then proceeded to find that the findings of fact were flawed because there had been errors of *law* but declined to make its own findings (as it was entitled to do by virtue of section 4(7)(a)) and remitted the case to DBS.

20. In our judgment, that was a permissible approach but not a necessary one. It would have been a necessary approach if an appeal lay only on a point of law, but it cannot be regarded as a necessary approach given section 4(2)(b), which is plainly intended to add something to section 4(2)(a). If the Upper Tribunal meant to suggest that the approach was made necessary by "the limited jurisdiction of the Upper Tribunal" in the light of section 4(3), we respectfully disagree.

21. The principal authority upon which Mr Lewis relied was *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC); [2021] AACR 3 in which the scope of an appeal on the ground of a mistake of fact was considered in some depth as a preliminary issue and therefore in the abstract without special reference to the evidence in the case, although it is apparent that the appellant had been included in the Adults' Barred List under paragraphs 9 and 10 of Schedule 3.

22. At [12], the Upper Tribunal said –

> "12. In *R (Royal College of Nursing) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin), [2011] 1 WLR 1193, Wyn Williams J was concerned with a challenge by way of judicial review to the lawfulness of some aspects of the scheme under the 2006 Act. This was not an appeal against a decision of the Upper Tribunal. The judge commented on section 4(2)(b):
>
> > '102 During oral submissions there was some debate about the meaning to be attributed to the phrase "a mistake . . . in any finding of fact" within section 4(2)(b) of the Act. I can see no reason why the subsection should be interpreted restrictively. In my judgment the Upper Tribunal has jurisdiction to investigate any arguable alleged wrong finding of fact provided the finding is material to the ultimate decision.'
>
> That is an unexceptional statement of what the legislation says. Like the judge, we see no justification for restricting the natural interpretation of the language of section 4(2)(b) in its context."

23. However, later in its decision, the Upper Tribunal considered further what might amount to a "mistake" of fact. It said –

> "*The mistake*
>
> 37. Section 4(2)(b) refers to a 'mistake' in the findings of fact made by the DBS and on which the decision was based. There is no avoiding that condition. The issue at the mistake phase is defined by reference to the existence or otherwise of a mistake. If the Upper Tribunal cannot identify a mistake, section 4(5) provides that it must confirm the DBS's decision. That decision stands unless and until the tribunal has decided that there has been a mistake.
>
> 38. 'Mistake' is the word used and there is no reason to qualify it. The courts operate a test of whether a decision was 'wrong'. This has in the past been qualified by words like 'plainly'. Nowadays, that has to be understood in the way explained by the Supreme Court in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 W.L.R. 2600:
>
> > '62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone 'plainly wrong', and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it

> may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion.'

That draws attention to the need to identify an error or, in the language of section 4, a mistake. It is not enough that the Upper Tribunal would have made different findings. The word 'plainly' has not yet taken root in the Upper Tribunal's cases. The phrase was used in *XY v Independent Safeguarding Authority* [2011] UKUT 289 (AAC), [2012] AACR 13 at [53], but the tribunal was merely giving a general description of the tribunal's jurisdiction on mistake of facts and not dealing with its interpretation. In order to avoid any doubt or confusion about what it means, it is better to use only the statutory language and avoid any qualifiers.

39. There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. This includes matters such as who did what, when, where and how. It includes inactions as well as actions. It also includes states of mind like intentions, motives and beliefs.

40. Mr Jaffey argued that facts did not include the factors relevant to the assessment of the risk and the need for protection that was the focus of the appropriateness to include a person on a list. He criticised some statements in some of the Upper Tribunal's decisions he cited for trespassing over that boundary. He is right that that the tribunal's jurisdiction at the mistake phase has to be limited to finding a mistake of law or fact. He is also right that labelling something as a finding of fact does not of itself make it one. But we are sceptical whether the line between findings of fact and factors relevant to assessing risk is so clear in principle or so easy to draw in practice as his argument suggested. A simple example makes the point. Suppose the tribunal comes to the conclusion – a deliberately neutral expression - that the appellant has a propensity for risky behaviour. That is a finding of fact about character, personality and behaviour, which relates to the present and to the future. It is also a factor that is relevant to the assessment of risk, again present and future. In neither case is it likely to be decisive. As both a finding and a risk factor, it will have to be assessed in the context of the other findings or factors as a whole. There is no reason why it has to be classified as one or the other; findings and risk factors are not mutually exclusive categories. Nor is it necessary to split it into parts, consisting of a finding about the present, separated from the element of future risk. At the best, such an exercise is artificial; at the worst, it is unworkable. The reality is that the conclusion is both a finding and a risk factor. It is pointless to require a tribunal to draw a distinction that does not exist.

41. The mistake may be in a primary fact or in an inference. There was a discussion at the hearing about primary and secondary facts and about inferences. It became clear that these terms were used in different senses, so we need to make clear what we mean. A primary fact is one found from direct evidence. An inference is a fact found by a process of rational reasoning from the primary facts as a fact likely to accompany those facts.

42. One way, but not the only way, to show a mistake is to call further evidence to show that a different finding should have been made. The mistake does not have to have been one on the evidence before the DBS. It is sufficient if the mistake only appears in the light of further evidence or consideration.

43. When the Court of Appeal deals with a challenge to a judge's findings of fact on appeal, it largely limits itself to the evidence that was before the court below and only allows fresh evidence if it satisfies the conditions set out in *Ladd v Marshall* [1954] 1

WLR 1489. Laws LJ explained the basis of that approach in *Subesh v Secretary of State for the Home Department* [2004] EWCA Civ 56, [2004] Imm. A.R. 112:

> '44. The answer is, we think, ultimately to be found in the reason why (as we have put it) the appeal process is not merely a re-run second time around of the first instance trial. It is because of the law's acknowledgement of an important public interest, namely that of finality in litigation.'

In *Edwards v Bairstow* [1956] AC 14 at 38, Lord Radcliffe referred to the efficient administration of justice. Those reasons make eminent sense in an appeal from a court or tribunal. They are not appropriate to an appeal from an administrative decision-maker and do not apply under section 4."

24. The Upper Tribunal then considered to what extent, if at all, the Upper Tribunal should "respect" DBS's decision and, in particular, its reasoning. It concluded –

> "48. …. It may … be that some aspect of the DBS's reasoning will assist the tribunal in making its own assessment of the evidence before it.
>
> 49. We prefer to avoid talking in terms of respect, or in terms of the starting point for the tribunal's consideration beyond saying that an appellant must demonstrate a mistake of law or fact. We put it like this. The DBS's reasoning will be before the Upper Tribunal and the tribunal will take account of it for what it is worth in the context of the evidence as a whole. At one extreme, it may be of little assistance. If the tribunal has received significant further evidence (such as oral evidence that would not have been available to the DBS), it is likely that its evaluation of the evidence that was before it will have been overtaken so that the only appropriate approach will be for the Upper Tribunal to begin afresh. At the opposite extreme, it may play a significant role. If there is no further evidence put to the Upper Tribunal, the DBS's reasoning may well form the basis of the case that the appellant has to meet. Between these extremes, its relevance and significance will depend on the circumstances of the case. There may, for example, be some feature of the case – assessing victim's evidence, perhaps – on which the DBS's reasons disclose a special understanding of the evidence on which its findings were based and on which the tribunal's specialist members may have some insights to contribute. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.

25. At [51], the Upper Tribunal helpfully summarised the effect of its decision and said –

> "51. Drawing the various strands together, we conclude as follows:
>
> (a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).
>
> (b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.
>
> (c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.
>
> (d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).

(e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.

(f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.

(g) The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker."

26. Mr Lewis relied upon what the Upper Tribunal said at [37] and [38] and, in particular, the citation from *Henderson* and the following two sentences. (He also drew our attention to *Volpi v Volpi* [2022] EWCA Civ 464 but that case, which is not materially distinguishable from, and merely follows the approach taken in, *Henderson* does not in our judgment add anything to his argument.)

27. We find the reference to *Henderson* in *PF* puzzling, given that the Upper Tribunal considered *Ladd v Marshall* and *Edwards v Bairstow* to have no application on an appeal under section 4 of the 2006 Act. In our view none of those decisions is relevant to an appeal under section 4. *Henderson* was concerned with the approach to be taken by the Inner House of the Court of Session on an appeal from a Lord Ordinary – equivalent to an appeal to the Court of Appeal from a High Court Judge (which was the context of *Volpi*) – where there is a proof or trial in the lower court, which hears evidence, but where evidence is hardly ever admitted before the appellate court. This point was emphasised by Lord Reed JSC in the paragraphs immediately following the one cited by the Upper Tribunal. In such circumstances, an appeal is inevitably conducted by way of a review of the lower court's decision. In the present case, the position is reversed. DBS, as is its almost invariable practice and indeed as one might expect, did not receive oral evidence before making its decision, whereas we heard oral evidence from the Appellant and two other witnesses, who were able to expand upon the written statements provided to DBS and to answer our questions and those of counsel. DBS did not call any oral evidence, but it would have been entitled to do so had it wished.

28. Moreover, the reference to *Henderson* is not, in our judgment, a necessary part of the Upper Tribunal's reasoning. It seems to be relied upon at all only in the two sentences immediately following the citation from the judgment of Lord Reed JSC. As to those two sentences, we agree that, if an appeal is to be allowed, it is necessary for a person appealing under section 4 to identify a "mistake" – or, in less adversarial language, that it is necessary that the Upper Tribunal be satisfied that there has been a "mistake" – but, in our judgment, both that requirement and the meaning of "mistake" are to be derived from the language of section 4 itself, and not from any principle that might be derived from *Henderson*. That there is only a "mistake" if an error is material to the ultimate decision, as Wyn Williams J held in the *Royal College of Nursing* case to which the Upper Tribunal had referred at [12], is the clear implication of that word being used in both subsection (5) and subsection (6) of section 4. It follows from the requirement that there must be a "mistake" in that sense that, as the Upper Tribunal held, "(i)t is not enough that the Upper Tribunal would

have made different findings". Thus, those two sentences immediately following the citation are justified without reference to *Henderson*. In the rest of its decision, the Upper Tribunal appears to be indicating that the approach taken in *Henderson* is *not* appropriate, at least when the Upper Tribunal hears oral evidence. In particular, there is also nothing in paragraph [51] that is derived from *Henderson*, save at [51(g)] and even there the approach appears to be disavowed at least when the Upper Tribunal receives additional evidence, whereas we note that Wyn Williams J's approach to "mistake" is reflected at [51(b)].

29. Adopting a *Henderson* approach to mistakes of fact is also in our judgment inconsistent with the language of section 4 which, as we have said, deliberately refers both to errors of law and errors of fact. In *Henderson*, Lord Reed JSC distinguished between an error of law and a failure to deal adequately with the evidence (see his headings above [22] and [28]), but in public law contexts such as the present, material errors in dealing adequately with evidence, such as making perverse or irrational findings, failing to give any or adequate reasons for findings, failing to take into account and/or resolve conflicts of fact or opinion or giving weight to immaterial matters, are regarded as mistakes of law (*R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9] and [10]). In providing for an appeal in respect of mistakes of fact as well as mistakes of law, section 4 must be taken to be intending a wider right of appeal than would be provided by allowing an appeal only in respect of a mistake of law.

30. We acknowledge that, in *Bradley Fold Travel Ltd v Secretary of State for Transport* [2010] EWCA Civ 695, the Court of Appeal considered the implications of the Upper Tribunal having under paragraph 17 of Schedule 4 to the Transport Act 1985 "full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport" and it concluded that the Upper Tribunal's jurisdiction was limited to what was in effect a *Henderson*-like approach. However, at [34] to [40], it reached that conclusion because, in practice, the Traffic Commissioners, from whom the relevant right of appeal lay, held (and still hold) public inquiries before making decisions on disputed facts. The language used in the 1985 Act is ultimately derived from paragraph 1 of Schedule 10 to the Transport Act 1947 and we consider it possible that a more modern statute would have confined the right of appeal to points of law. DBS has the power to hold hearings, but it does not exercise that power save where a person's inability, or virtually inability, to make written representations makes oral representations "necessary" (see the *DBS oral representations guide*). It is precisely the existence of a full merits right of appeal to the Upper Tribunal on issues of fact that makes it unnecessary for DBS to receive oral representations or evidence in other cases (see the *Royal College of Nursing* case at [103]).

31. There is no other reason to imply any fetter on the scope of a right of appeal from a public authority to a tribunal unless the public authority can claim any special expertise – the usual assumption being that the tribunal is at least as competent as the public authority to deal with the subject matter of any appeal (although, of course, neither is infallible and individual decision-makers in a public authority may sometimes have more experience than individual tribunal judges or members). Here, as the Upper Tribunal concluded in *PF*, DBS's expertise lies in assessing the risk a person may pose and therefore the appropriateness of barring that person, rather than in the finding of facts, and there is no need for implication because DBS's expertise is expressly protected by section 4(3).

32. We note that, in *AB v Disclosure and Barring Service* at [44], the Upper Tribunal has pointed out that what was said in *PF* at [40] now has to be read in the light of the later decision of the Court of Appeal in *Disclosure and Barring Service v AB* and we would extend that to the last sentence of [49] and the last sentence and a half of [51(f)]. We respectfully agree with the statement in *PF* [at 39] that "states of mind like intentions, motives and beliefs" are matters of fact. Thus, a finding that a person has acted recklessly when putting a child or vulnerable adult at a risk of harm is clearly a finding of fact within the Upper Tribunal's jurisdiction. In the light of *AB v Disclosure and Barring Service* itself, a finding that a person has a propensity for risky behaviour would presumably also be within the Upper Tribunal's jurisdiction when paragraph 5 or 11 of Schedule 3 is in issue. What is not within its jurisdiction is any assessment of the degree of risk arising from any such propensity, save to the extent to which the Upper Tribunal is entitled to decide that it would be *Wednesbury* unreasonable to decide either one way or the other on the facts of a case. It is not necessary in this case to consider whether, and if so when, it might be either necessary or appropriate for the Upper Tribunal to make a finding that a person has a propensity for risky behaviour in a case where neither paragraph 5 nor paragraph 11 is in issue.

33. On the other hand, we agree with the view of the Upper Tribunal in *PF* that there is a close relationship between a finding as to the state of mind of a person when engaged in relevant conduct in the past and the future risk posed by that person. This suggests a need for DBS, and, on an appeal, the Upper Tribunal, always to make findings as to a person's state of mind when deciding as a matter of fact that a person has engaged in "relevant conduct" or, in the context of paragraphs 5 and 11, that a person has engaged in other conduct that might suggest that he or she poses a risk of harm, so that the findings are taken into account when assessing appropriateness.

34. In the light of the authorities to which we have referred, we accept that the distinction that we suggested between an appeal by way of rehearing and an appeal by way of a review may oversimplify the position. Indeed, there cannot really be a *re*hearing if there has been no hearing (in the sense of a hearing of oral evidence) at all before DBS. As *SV* demonstrates, where there are challenges to DBS's findings of fact, the Upper Tribunal (and the parties) may choose to proceed by way of a review and consider only whether DBS's findings are vitiated by errors of law, in which case it may decide not to hear evidence and may remit the case to DBS to make fresh findings and remake its decision in the light of them. This may avoid an oral hearing before the Upper Tribunal altogether.

35. However, where an appellant wishes to give evidence at an oral hearing and the Upper Tribunal accedes to that request, which it will do if the appellant has an arguable case and it appears unlikely that disputes of fact will fairly be resolved without such evidence being admitted, it may make its own findings of fact, in which case it will allow the appeal if its findings are materially different from those made by DBS, in the sense that they would or might lead to a different conclusion as to the appropriateness of including the appellant in the relevant List(s). We do not consider it necessary for the Upper Tribunal to identify an error in DBS's reasoning, but it must explain why it reaches a different conclusion and that may in practice result in one or more defects being identified. If arguments of law have also been raised in such a case, the new findings may make it unnecessary to address those arguments independently, although the arguments may be relevant to the approach that the

Upper Tribunal takes to the evidence. In our view, it follows that the Upper Tribunal may make different findings when it considers an appeal without an oral hearing, again without necessarily finding an error in DBS's reasoning but explaining its own. There are therefore different ways in which an appeal may be approached.

36. Thus, the fundamental point relevant to this case is that, unlike in an appeal under section 11 of the Tribunals, Courts and Enforcement Act 2007, it is not necessary for the Upper Tribunal to find an error of law in DBS's fact-finding before it substitutes its own findings of fact. While the Upper Tribunal's decision should show why it is differing from DBS on matters of fact, it is not obliged to find a defect in DBS's reasoning; it is enough that it takes a different view of the evidence.

The grounds of appeal

37. In the present case, a hearing has been arranged precisely so that the Upper Tribunal may hear evidence and make its own findings of fact. In these circumstances, challenges to DBS's findings of fact on the ground that they were based on errors of law effectively become mere reasons for submitting that the Upper Tribunal should make different findings. Eleven of Mr Chiffers' thirteen grounds of appeal (*DBS* pp. 346-341) fall into that category and we will address the issues raised in most of them as far as is necessary when considering the facts of the case without, except in relation to his first ground, deciding whether the grounds identify *Henderson*-type "mistakes".

38. His third and seventh grounds allege errors of law in DBS's decision that it was appropriate to include her in both Lists. They fall away in the light of our findings of fact but, on the facts found by DBS, we would reject both grounds.

39. As to the third ground, the complaint is that DBS said in its "minded to bar" letter that the Appellant's behaviour was "repeated" and that there was a risk of her "repeating" the behaviour in the future when, it is argued, there was no evidence of a pattern of behaviour. It is true that DBS has found her to have behaved inappropriately on only two occasions and that the circumstances were different on each occasion, but, in its context, it is clear that DBS was merely saying that the Appellant had behaved irresponsibly on each of those two occasions and it was concerned that she would do so again. On its findings, it was entitled to express that view and to rely on it in making its decision.

40. In the seventh ground, it is argued that DBS has failed to give reasons for its decision to include the Appellant in the Adults' Barred List as well as the Children's Barred List. It is true that the way that DBS's findings of fact and its conclusion that they amounted to relevant conduct in respect of both children and vulnerable adults ware badly laid out in the "final decision" letter (*DBS* p.312). It is also true that the standard sentence that is used by DBS when conduct against a child is considered to be relevant conduct in relation to a vulnerable adult because it is ""conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him" fails to convey that message when read without reference to the terms of the legislation (and, in our view, ought to be rewritten). However, if one is aware of paragraph 10(1)(b) of Schedule 3, it is clear enough what was meant and it is also obvious in this case why, given that DBS considered that the Appellant's conduct had endangered a child or was likely to endanger a child, it considered that the same conduct towards a vulnerable adult would also endanger

that adult or be likely to do so. The Appellant has not suffered any injustice due to the way in which the letter was written, because adequate reasoning on DBS's part in relation to this particular issue can still be discerned.

41. We turn, then, to the two allegations, one of which is partially denied by the Appellant and the other of which is wholly denied by her.

Allegation 1

42. This allegation – "that you have displayed inappropriate conduct and responses to JP and KK in front of KK and whilst supporting him" – was not a subject of the Appellant's employer's referral to DBS but there were references to it in the documents accompanying the referral form. First, in the management report compiled for the disciplinary interview in respect of Allegation 2, it was noted in relation to the Appellant's background that a concern had previously been raised "regarding EB's conduct and response to a colleague while supporting KK during a Waking Night shift on 16/05/19 – This was investigated and resolved through supervision with EB" (*DBS* p.40). Secondly, there is an unsigned staff supervision form (*DBS* pp. 71-73), containing notes of a discussion that the registered manager, AL, had with the Appellant on 22 May 2019 and his "review of the evidence". DBS has not adduced any other evidence in respect of this allegation. (It could have asked the employer for a copy of any statement by, or interview of, JP in relation to this incident.)

43. It appears from the notes of discussion that the Appellant's colleague, JP, had complained that she had "shouted at him and treated him in a disrespectful manner in front of [KK]" and had "raised her voice to KK and told him to shut up and he wasn't allowed to choose his staff". On the other hand, the Appellant had said that JP had been playing with KK when he should have been settling him to sleep and she had had, or had tried to have, a conversation with him and did not raise her voice. She said that JP would not talk to her and she had asked him why and said "how old are you?" She said that she did not tell KK to shut up but did tell him that he could not control the rota and that any member of staff could work with him.

44. In AL's review of the evidence, it was recorded –

> "There were allegations made by both parties during this investigation which has been made more difficult due to JP being an agency member of staff to whom I do not have regular access to [sic].
>
> Due to only the two people making allegations being present it is difficult to ascertain who is telling the truth.
>
> The behaviour and attitude of the staff member in question will be monitored."

It was also recorded that EB was reminded that professional standards and behaviour were required, that children "may choose the staff supporting them especially if it is going to reduce their levels of anxiety" and that "the use of mobile phones around the children" was not allowed.

45. There is no evidence that that incident played any part in the employer's decision to dismiss the Appellant ten months later. It was, however, relied upon by DBS in its "minded to bar" letter where, within a paragraph dealing with both Allegation 1 and Allegation 2 (*DBS* p.20), it said –

> "You have also displayed inappropriate conduct and responses to JP, as you did not consider his management of KK acceptable, and you removed KK's freedom of choice, in telling him that it was "not up to him which staff attended to him, it was up to the person who did the rota". These behaviours [*i.e.*, those arising from both allegations] appear to have displayed an attitude that 'you know best' …."

46. DBS's explanation for making those findings appears in the Barring Decision Process document (*DBS* p.320) –

> "[EB] has stated that she did tell KK that he could not choose his staff, which supports part of the allegation made by JP, given that she then placed counter allegations against JP, this could be conceived as malicious, and were placed after the discussion about the allegations made against her, therefore the credibility of JP's statement is preferred as no malicious intent can be identified, also [EB] received some sanctions from her employer in the form of monitoring and discussion, and on the balance of probabilities this allegation is found proven."

47. The Appellant addressed in her representations (*DBS* pp. 304-5) what had been said in the "minded to bar" letter. She stated that JP was an agency worker, usually covering day shifts but on this occasion covering a night shift. She gave further detail about what passed between her and JP, stating that, when she found KK playing games on JP's telephone, she questioned JP and he challenged her by saying that KK wanted him, rather than the Appellant, to work with him and that there was then an exchange of words. She said that she believed she had done the right thing in settling KK to sleep and, while she could understand KK was happy playing on the telephone, she did not consider it was in his interests to do so rather than getting his sleep. She also complained that JP was allowed to continue working while she was suspended and that he was subsequently employed by the home, only to be later dismissed because he had been "stoned" on cannabis when he came to work. She concluded by saying –

> "… I understand it was wrong to have argued in front of KK of which I have learn a lesson from and would handle it well next time, but it takes two to argue …"

48. DBS's response, in the Barring Decision Process document *(DBS* p.320) was to maintain its original finding –

> "[EB]'s representations do not provide any further evidence to alter the finding of fact in this case, as she admits she had an argument in front of KK with JP, and that she was not happy and discussed with JP about allowing KK to use his mobile phone when he was meant to be settling down to sleep. She also continues to make a number of allegations against JP and other staff members, which supports the initial concerns that her statement could be considered malicious, and this finding of fact remains proven."

49. The Appellant's evidence to us was broadly consistent with her representations to DBS. She said that JP had been working with KK while she did other things. Later, she went to check on KK and found him sitting on the floor playing with the JP's telephone. She said to JP: "You can't do that. The child needs to be sleeping", to which he replied: "I am working with him." She denied that there had been an argument, rather than a conversation, but said that, being married to an Englishman, she was conscious that her "African tone of voice" could seem harsh. KK said that he wanted to be with JP but she told JP to just go and take his telephone with him, whereupon he said that he would report her to the manager. She then settled KK. She said that KK needed a routine and that if one played with him in the middle of the night it would become a pattern. She also said that only she

and JP were on duty and that, while KK was entitled to choose from those on duty the person who he wished to work with him, he could not choose the rota and he was supposed to be asleep rather than playing. She told us that she had no authority over JP and that there was a duty manager who could be called if advice was needed. However, she said that permanent staff tended to take the lead when on duty with agency staff, because they knew the children and the home better. She accepted that she should not have disagreed with JP in front of KK and said that, if the situation arose again, she would ask the other carer to come out of the child's room so she could have a word with him or her.

50. DBS has not sought any further evidence from the employers to rebut what the Appellant says about JP's subsequent behaviour and his dismissal. (A dismissal might have led to a referral to DBS, but whether there was such a referral we do not know and did not ask.)

51. Mr Lewis repeated DBS's argument that AL had preferred JP's account to the Appellant's and had imposed what he described as the "sanction" of the reminders to the Appellant and he submitted that we could rely on that finding. However, in our judgment, the natural implication of AL saying that it was "difficult to ascertain who is telling the truth", without then saying which account he preferred, is that he did not consider it necessary to decide between the two accounts and was content to resolve the issue informally through advice. We have not been told what, if anything, was said to JP and, of course, he was not an employee as the Appellant was. In any event, even if AL did accept JP's account, we are not prepared to do so. The evidence before us as to what his account was is too vague and it has not been tested, whereas the Appellant has given detailed oral evidence to us and we are satisfied that her evidence is credible.

52. We have not been assisted by any other aspect of DBS's analysis of the evidence in the "Barring Decision Process" (*DBS* p.320) either. It is not explained why what are characterised as "counter accusations" should be regarded as malicious and therefore untrue, rather than being true and an explanation of her actions. The Appellant's complaint that she and JP were not treated equally is not really relevant to the issue we need to decide, but she was perfectly entitled to tell DBS of other instances of irresponsible behaviour on JP's part and thereby implicitly argue that it should accept her account of his irresponsibility on this occasion. DBS was entitled not to investigate that collateral issue, but, if it did not, there was no basis for holding against the Appellant the fact that she had raised the issue.

53. We therefore accept the Appellant's account of this incident, although we also accept the accuracy of AL's notes of the discussion on 22 May 2019 (which the Appellant does not dispute). We consider the Appellant's account to be plausible and there is no evidence whatsoever to controvert it save what is implicit in the questions asked by AL.

54. In particular, we accept that she intervened because she considered that JP was inappropriately allowing KK to play with his mobile phone, when KK should have been asleep and JP should have been encouraging him to go to sleep. Indeed, as "the use of mobile phones around the children" was not allowed (see paragraph 44 above), allowing KK to play games on a mobile phone was patently a breach of the home's rules and good reason by itself for the Appellant to intervene firmly to bring it to an end. DBS has made no finding as to her motive. We also accept that, although she was firm and her tone may have grated on JP, she did not raise her voice to him.

We accept that she did not tell KK to "shut up" and we accept her reason for telling him that he could not choose the rota.

55. We are not satisfied that what the Appellant said to KK either harmed him or caused any risk of harm to him. In the context in which it arose, there is no reason to suppose that it was, or could have been, considered by KK as being any more confrontational than a perfectly proper statement that he should be asleep.

56. However, the Appellant admits that it was wrong of her to have criticised JP's conduct in front of KK. Whether or not her conversation with JP amounted to an argument – on balance, we think it did – there was certainly a disagreement in front of KK. We accept that, as she recognised, having such a disagreement carried a risk of harm to KK because, due to his vulnerabilities, witnessing any conflict was capable of causing him emotional harm. There is no evidence that he was actually caused any harm, but, in the light of paragraph 4(2)(c) of Schedule 3 to the 2006 Act and the strict approach that we consider is appropriate when considering whether conduct is "relevant conduct", we are satisfied that, by her conduct, the Appellant endangered KK. However, as we shall explain below, we do not consider that barring the Appellant in the light of this conduct alone is justifiable.

Allegation 2 – the evidence

57. This is the more serious allegation. In his skeleton argument, Mr Lewis submitted that the appeal ought in practice to turn on whether DBS made a mistake of fact regarding this allegation, and we agree. The Appellant herself described the alleged conduct as being "a despicable act" (*DBS*, p.303).

58. It is alleged that, on 12 January 2020, the Appellant "forced KK to drink by holding his head and putting tissues over his mouth to prevent regurgitation". Again, DBS relies solely on the information provided by the employers with the referral form. (It did not ask the employer to provide a copy of the "KK Allegations Log – 12/01/20" or the "codes of conduct and policies" mentioned in the disciplinary process management report (*DBS* pp. 39 and 43) or any other documents relating to the care of KK, such as a care plan or handover notes and event logs relating to the night of 11 to 12 January 2020, including those made by the Appellant, or relating to the periods before and after that night when he was behaving as he was on that night.)

59. The most direct evidence is in the form of statements made by JS and AF, who did not give oral evidence before us, for the purposes of the employers' disciplinary process. We do not have copies of the written statements, but they were read out during the disciplinary hearing and we accept what is written in the minutes (*DBS* pp. 78-80) as an accurate record of the statements. (Mr Chiffers told us during the hearing that his instructing solicitors had obtained copies of the original statements, but we said that we did not need them unless any material discrepancy between them and the disciplinary hearing record was noticed by him or his solicitors.) There are also records of conversations that the registered manager, AL, had with both JS and AF (*DBS* pp. 47 and 69), which are also summarised in the disciplinary hearing minutes.

60. In her statement (*DBS* p.78), JS said –

> "On 12th January 2020, I was working with KK (resident) and [AF] (staff). I witnessed [EB] forcing a can of lemonade, approximately a quarter of a can, down KK's throat. [EB] put her hand over his mouth when he regurgitated it back. She had green

> towels in her hand. Whilst she was giving the drink, she placed her hand at the back of his head. His head was then tilted back and K couldn't move. When K regurgitated it on his duvet, her comment was "see K this is why you ask for a drink and you do this".

61. When interviewed by AL (*DBS* p.47), she is recorded as saying –

> "On hand over EB said KK was still not drinking enough and said she would show us (JS & AF) how she has been doing it, she then forced KK to drink Lemonade and covered his mouth to keep it in his mouth."
>
> "EB lifted KK chin up with her hand and forced him to drink Lemonade. Then she put her hand on the back of his head."

She demonstrated that to AL by "moving her chin upwards using her fingers and putting her other hand to the back of her head. She then covered her mouth with the other hand". She said that KK "didn't say anything but looked shocked" and that she did not say anything to the Appellant "as I have had a disagreement previously with [EB] and didn't want to cause an argument in front of KK" and that she and AF "went to get some cleaning stuff".

62. AF made two statements, but only the first (*DBS* p.79) is directly relevant to the issue before us. She said –

> "At 7.30 am I walked into the quiet lounge; [EB] was sat down and explained that she has been trying different techniques to get KK to keep liquid in his stomach including giving him lemonade and porridge. At 7.45 am [EB] said she will show me and [JS] what she had been doing. EB asked me to get some green paper towels. EB forcefully made K drink a quarter of the can of lemonade. K started to regurgitate the lemonade. [EB] placed green paper towels over K's mouth and placed her hand at the back of K's head as if he couldn't move. [EB] was saying 'don't do that'.
>
> Once K had swallowed his regurgitation, [EB] looked at me and said 'you see it stays in his stomach'. K then regurgitated again on his bed. [EB] turned to K and said 'why are you asking for drinks if you are just going to do that?' Me and [JS] went to get clean bedsheets for K. [EB] came to the door of the laundry room and said someone needs to be in there distracting him from throwing up. Me and [JS] told [EB] to leave and we would sort it out. Me and [JS] changed his bedsheets, gave K another 1ml of water and asked him to get some rest."

63. When interviewed by AL (*DBS* p.69), AF is recorded as saying –

> "When we went into the quiet lounge EB said she would show us how [to] get KK to drink and keep the food in his stomach, EB asked me to get her some paper towels which I did but I didn't know what she was going to do with them. EB put her fingers under KK chin to tip his head back and poured lemonade into his mouth, she then put one hand around the back of KK's head and used the other to hold a paper towel over his mouth to stop him spitting it out. KK looked worried."

She demonstrated by placing one hand at the back of her head and the other hand over her mouth. Asked whether she said anything to EB, she is recorded as saying –

> "I didn't say anything as I really didn't know what to say or do. I told the Senior on shift (LH) as soon as possible and she told PU."

Asked whether she left EB alone after that, she is recorded as replying –

> "I went to the laundry with JS to get clean clothes etc. EB came to say that me and JS needed to go into his room to distract him from vomiting. I told her it was ok and that we would clean up and that she could go."

64. The Appellant was called back later that day and suspended. She later made a statement for the purposes of the disciplinary proceedings and was interviewed briefly by AL (*DBS* pp. 61-65 and 58). She also attended a disciplinary hearing, at which she answered questions (*DBS* pp. 87-95).

65. In her statement, she said that her shift was from 10 pm on 11 January 2020 until 8 am on the following morning. She had last been on duty on a night shift ending on the morning of 7 January. At the handover on 11 January, she was told that KK had been unwell. She said in her statement that she was told that he had been "placed on admission at the hospital for 2 days", that he had not been eating or drinking but had been throwing up and that he had "lost about 13 stones" and that the doctors had concluded that KK did not have an infection or bug but believed that his throwing up was behavioural.

66. In any event, she said in her statement that she was concerned that KK would become dehydrated and suffer harm as a result. The deputy manager gave her a syringe with which to assist KK to take water. The deputy manager also informed her that KK had not eaten all day and they agreed that she should try various types of food. She then describes in her statement how she offered him food and, when he ate, he either threw it up again or spat it out. This continued over a period of some hours and then the Appellant spent some time sitting outside his room, so that he could get some sleep but she could keep an eye on him.

67. She then said in her statement that, at about 2.45 am, KK called out to her and said he wanted a drink. She offered him water, but he refused it and said he wanted blackcurrant, but he then declined that and said that he wanted flavoured water. However, there was none and, when she told him, he agreed to lemonade instead. She drew lemonade into the syringe, but KK declined it and said that he wanted a straw instead. However, there was no straw and so he said that he would drink from the can. She encouraged him to take small sips, feeling that that would reduce the chances of him throwing up.

68. She continued in her statement to explain that he would take a few sips and swallow them and then take another and spit it out. She was glad that he was taking in the rest and would leave him for a few minutes and then he would request some more and the same thing would happen. This continued for the rest of the shift.

69. At about 7.40 am, she said in her statement, the Appellant started her handover to the day staff and, while she was doing so, KK shouted out that he was thirsty. She had been explaining what had happened during the night. She went to KK with the can and he took a sip, but immediately spat it out. She said that she gently told him not to do that. She asked one of the day staff to give her a tissue to wipe what KK had spat out off her hand, but some had dripped onto the bed. The member of day staff brought her one tissue but the Appellant asked for more. She was given a "bunch of tissues" and the day staff then left the room. The Appellant remained with KK and removed his mattress cover and pillow. She them went outside and found the day staff talking outside the laundry. She asked why they were standing there chatting instead of helping her. They said that she had finished her shift and could go home, which she did after telling where the duvet cover was and finishing her notes.

70. AL briefly interviewed the Appellant after receiving the statement. Having clarified the points about KK's visits to his GP and the hospital and about his weight loss, AL asked her if she had given KK the can. She replied that she was holding it

and KK was sat on his bed. She denied covering his mouth at all or holding him anywhere. She said that she had a tissue in her hand and "he did what he did into my hand", which AL noted was referring to him being sick, and that she would not cover his mouth. AL noted that she said that she had told the other staff to go into the room with her and that she told them she had been pouring lemonade in his mouth. "I wasn't trying to kill him, why would I do that? I was caring for him in a kind and compassionate way." AL said that no-one was accusing anyone of trying to kill KK. The Appellant said: "AF looks at me in a funny way. I don't have anything against her. Why didn't they stop me if I was doing wrong? I wasn't trying to kill him or suffocate him."

71. AL referred the matter to a disciplinary hearing, which the Appellant attended with her husband. After the statements and interview notes had been read out, AL said that "K also made comments that [EB] had hurt his chin and pointed to his chin later on that day" (*DBS* p.87), although when the Appellant asked later during the disciplinary hearing what she did to hurt his chin, AL said: "I can't tell you the answer to that" (*DBS* p.94). AL also made the point that KK would usually be given a cup to drink from, rather than feeding liquid to him from a can. The Appellant raised the question whether she could have been holding the can and the back of KK's head and a tissue all at once and then she explained that she had been trying to use the tissue to collect what KK was spitting out, rather than to cover his mouth. She said that she had been expecting the day staff to come back with tissues or a towel and to help her, but they were grinning when they went out and they did not return. When she went out, they picked up a bucket, but there was no need for that because the mess was on the bed, rather than the floor. The Appellant also mentioned that, during the week up to her previous shift ending on 7 January 2020, KK had been spitting out food and spreading it around the room so that it had been necessary for her to clean the room when she started the shift each night. The Appellant also referred to her past relationship with both JS and AF, to which we will return below. She also explained that she had worked as a healthcare assistant in hospitals and that she had wanted KK to drink a bit of fluid because she knew the side effects of dehydration and she made the point that, if the hospital had provided him with a drip or two, she might not have needed to give him fluid. She also mentioned the "agency lady" who was working with her that night, and we shall return to her later. She also denied hurting KK's chin. Finally, she said that she was happy where she worked, that she became fond of the children and, "as a mother", would not do what she was accused of to any child.

72. Interestingly, when the chairman of the disciplinary hearing, described as another registered home manager, announced her decision shortly after the end of the hearing, she apparently said that the allegation that she had believed was that the Appellant had "forced KK to drink lemonade and held his head and placed [her] hands and the tissue *under his chin* to prevent him vomiting this back out again" (*DBS*, p.96 – our emphasis). However, the dismissal letter reverted to the allegation that she had "forced KK to drink Lemonade and then held his head and placed her hand and paper towels *over his mouth* to prevent him vomiting the drink back up" (*DBS*, p.102 – our emphasis) and, although the letter does not expressly state that that allegation was accepted, it is perhaps to be inferred that it had been accepted by the time the letter was written. The letter did say that JS and AF were "credible and competent to raise the concerns they did" and it also descended to the detail of noting that it was "not normal practice to allow a young person to vomit into the

hands of staff as this would breach a number of policies/procedures" and that KK was able to hold a cup to his mouth and his care plan did not instruct staff to hold drinks to his mouth for him to drink from. Slightly different, but not inconsistent, reasons, which appear to have been written by AL and were perhaps a draft, appear in a management report (*DBS*, p.43), but nothing really turns on the employers' reasons for their findings.

73. DBS has put its allegation slightly differently from the way that the employers did. In the Barring Decision Process document (*DBS*, p. 321), it is put as "Forced KK to drink by holding his head and putting tissues over his mouth to prevent regurgitation" and in the "minded to bar" letter, it is put as "forced KK to swallow his drink by holding his head and putting tissues over his mouth to prevent regurgitation", which perhaps better puts what it meant. This is different from the employers' finding, which is that the Appellant first forced the Appellant to drink lemonade "*and then*" prevented him from vomiting it back up. This is perhaps closer to the allegations made by JS and AF in their statements which, at least at first sight, suggest two elements of misconduct: forcing KK to drink lemonade and then stopping him from spitting it out or from spitting out what he had regurgitated.

74. The Appellant gave evidence to us. It was consistent with what she had said before in her statement and representations, but she did expand on some issues. In particular, she clarified what she meant when she had said in her representations, and in her oral evidence, that she had been "pouring" the drink into KK's mouth, echoing the language used by AF when she was interviewed by AL. She said that she had held the can to KK's mouth and then tipped it so that he could take sips. She agreed that he had been perfectly capable of drinking from a cup or holding a can but said that she held the can that night because of the condition he was in and that, if he had not wanted her to hold the can, he would have said so.

75. She also expanded on her previous relationship with JS and AF and she was asked about racism, which was an issue she had raised in her appeal against her dismissal and then in her representations to DBS. As regards JS and AF, she said that she had never actually worked a shift with either of them. JS had, however, shut her in a pantry when they first met and it had taken her some five minutes or so to get out. The employers appear to have thought it was an accident but the Appellant told us that she thought it was deliberate although what really annoyed her was the lack of any apology, despite AL having promised there would be one (see *DBS* p.302). As to race, she said that she had noticed that, while three of the four regular waking night support workers were African and the other was Indian, the day staff were all white Caucasian, except for the occasional agency worker, and she reiterated what she had said in her representations (*DBS* p.302) about several members of the day staff not speaking to her when they came on duty. AF was one of those, as she had said in her disciplinary hearing (*DBS* p.90). She said that she enjoyed her work and became fond of the children – she particularly mentioned conversations with KK about the same sort of things that her own children were interested in. She said that the waking night support workers worked together as a good team, but she did not find the home a nice place to work, partly due to the attitude of some of the day staff and partly because she felt that management did not listen to her side of the story when there were disputes.

76. We also heard oral evidence from two other witnesses and had two identical versions of a written statement for a third – an email with her typed name on it and a

formally-typed but unsigned version (*App*. pp. 36-38). None of these three witnesses had actually witnessed the incident that JS and AF had reported.

77. However, one of them, BP, was the agency worker who had been on duty with the Appellant that night. That was the first time that they had met. She had had her own work to do, but she told us that she had helped the Appellant with KK and was there when she tried the syringe and the different drinks and KK did not want the syringe or most of the drinks. She said that she did not think that the Appellant could trust him to hold the can of lemonade and that she was not pouring it but, rather, holding it close to his mouth and tipping it so that he could take sips. She had seen the Appellant encouraging KK to drink later on, watching from the bedroom door for a while, but the last time she saw her was at about 6 am. She did not see anything untoward, only "a very caring carer" trying to encourage KK to eat and drink.

78. TO had worked with the Appellant once or twice a week for four months before the Appellant's final suspension, the last occasion being about two weeks before then. The Appellant had helped train her and she had seen the Appellant looking after the children and treating them very well. They had become friends and she had also seen the Appellant with her (TO's) own children.

79. The witness from whom we only have a written statement says she has twenty years' experience in children's homes and had worked with the Appellant. She had no worries in leaving the Appellant to care for the boys on a one-to-one basis. She also expressed the opinion that "some of our other colleagues did not understand the way that [EB] worked. [EB] was not interested in chatting when she came in on her shift and [EB] simply wanted to get on with her job" *(App* pp. 36 and 37).

Allegation 2 – discussion

80. There is obviously a substantial conflict between what the Appellant says and what JS and AF said. Mr Lewis submitted that there were reasons for being cautious about the Appellant's evidence. First, he pointed to her having said in her statement for the disciplinary process (*DBS* pp 61-65) and in her statement in these proceedings, signed on 15 February 2023 (*App* pp. 29-33) that she had been told that KK had lost 13 stone, which was clearly wrong. However, we are not convinced this is significant. When she was interviewed by AL after he had seen her first statement, he told her that KK had been taken to see his GP and a hospital but had not been admitted and that he had not lost 13 stone. He recorded that the Appellant accepted those points. Before us, the Appellant was unable to say where the figure had come from but she said she really had no idea about people's weights or what 13 stone meant. She said that she ought to have said "a substantial amount of weight". The content of her statement in these proceedings is exactly the same as the content of the statement she had made three years earlier for the purpose of the disciplinary proceedings and was obviously just reproduced on a computer. Clearly, it should have been corrected. However, we are not persuaded that the figure was a deliberate attempt to exaggerate; it is too unrealistic for that to have been the case and, anyway, there was no point in exaggerating the figure in her original statement when the home itself presumably knew what the true figure was. Perhaps the figure of 13 pounds was mentioned to her at the time but, whatever the explanation, we do not consider there to be any significance in the two errors that were made by the Appellant in her original statement and were cleared up in conversation with AL.

81. Secondly, Mr Lewis pointed to the Appellant having denied, in relation to Allegation 1, that her disagreement with JP had not been an argument, suggesting a willingness to downplay the significance of her actions. We accept that that was one of the less convincing parts of the Appellant's evidence but we are not satisfied that it puts into doubt the rest of her evidence. She has admitted that she should not have had the disagreement in front of KK and her insistence that it was not an argument was, in our view, related to her contention (which we have accepted) that she did not raise her voice to JP.

82. Thirdly, Mr Lewis referred to the Appellant having said on a number of occasions that KK was "normal" or "very able" which, he submitted, raised a concern about her understanding of his vulnerabilities and needs. However, we do not consider her comments to have been inappropriate in their context. For instance, on one occasion she was simply making the point that he could talk and express himself and on another that he did not suffer from any physical disability. Nor do we consider that, in its context, it was inappropriate of her to talk of treating KK as though he was one of her own children.

83. We consider the Appellant to have been an impressive witness – intelligent, articulate and thoughtful. When Mr Cairns asked her whether she had considered using foam or a sponge to help KK take liquid, she immediately recognised what he was talking about and told us that she had used such devices when working as a care assistant in a hospital where patients who had been undergoing chemotherapy had been at risk of becoming dehydrated, but she said that no such device had been available when she was working with KK.

84. However, we have to weigh the Appellant's evidence against that of JS and AF. We also have to consider what their evidence actually means, given that we have not been able to ask them to elaborate on their initial written statements and brief answers in interview. In the end, we consider that there are a number of reasons for accepting the important parts of the Appellant's evidence and for finding that, rather than forcing KK to drink, she was merely encouraging him to do so.

85. First, JS and AF both said that the Appellant had said that she would show them what she had been doing with KK. The Appellant denied having said that and her evidence was that JS and AF had just followed her into KK's room. However, she agreed that they were standing by his bed watching her and that is what, in our judgment, is important. It seems to us to be highly implausible that the Appellant would then have forced KK to drink, thereby demonstrating something that she must have realised was inappropriate, to two members of staff with whom she had frosty relations.

86. Secondly, BP supports the Appellant's evidence that she was merely encouraging KK to drink during the night, rather than forcing him to do so, when she was caring for KK during the night. It seems likely that she would have noticed if the Appellant had been acting inappropriately, and she did not know the Appellant at that time and so had no reason to cover up any fault on her part. We specifically asked the Appellant whether she was becoming more desperate that KK should drink as the night wore on, but she told us that, on the contrary, she was relieved that KK had been taking some liquid, even if not very much, which is what she said in her statement to her employers (*DBS* p.64 at paragraph 27). It seems unlikely that she would then have taken a different and wholly inappropriate approach when demonstrating what she had been doing to JS and AF. In addition to BP, we have

the evidence of TO and the third witness as to the Appellant's general ability to care for children and we also know that she has worked in the care sector since 2011, shortly after she came to the United Kingdom, except for three years when she was looking after her own three children.

87. Thirdly, although it seems unlikely that JS and AF completely fabricated their statements out of thin air, neither of them had ever worked with the Appellant on the same shift and they hardly knew her. Moreover, there was clearly a coolness between them and the Appellant. The coolness may not always have been on one side, and we do not know the precise cause of it. It may just have been due to different personalities, but race might have been a factor together, perhaps, with a view on the part of some of the day staff that the waking night support workers were primarily domestic workers rather than carers. In any event, we consider it quite possible that there was a readiness on the part of JS and AF to place the worst possible construction on what they saw.

88. Fourthly, neither JS nor AF said anything about KK having asked for a drink. He must have been thirsty and we consider that he probably did ask for one, as the Appellant has said.

89. Fifthly, neither JS nor AF suggested that KK protested in any way, or that he spluttered as one might expect if he was being forced to drink. They did say that he looked "shocked" or "worried", but well he might when he was ill, thirsty and being sick.

90. Sixthly, while both JS and AF have said that the Appellant held the back of KK's head, JS has made two apparently different statements as to at what point that was. In her written statement she said it was "[w]hilst she was giving the drink", but when interviewed by AL she said that she "forced him to drink Lemonade" and "then she put her hand on the back of his head" and her demonstration suggested that she had her hand there at the same time that she was covering his mouth with her other hand. The second version is more consistent with what AF said and, as the Appellant pointed out at her disciplinary hearing, she cannot have been holding the back of KK's head at the same time as both pouring lemonade into his mouth and covering his mouth.

91. Seventhly, there is no dispute between JS and AF on one hand and the Appellant on the other that neither JS nor AF raised any concern about what the Appellant was doing with her at the time and they both then left her alone with KK while they went to the laundry where they still were when the Appellant went looking for them as she needed some help. This suggests that, if JS and AF did have concerns, they were not particularly serious and not as serious as the written allegations appear to be. Carers are, quite rightly, encouraged to report even quite minor concerns.

92. In the light of these considerations and the absence of any further explanation from JS and AF, we are not satisfied that JS saw the Appellant "forcing a can of lemonade, approximately a quarter of a can, down KK's throat" or that AF saw her "forcefully [make] K drink a quarter of the can of lemonade". We consider it to be improbable that the Appellant, who was not only intelligent and experienced but was well-regarded by at least some of her colleagues, would have thought it appropriate to force KK to drink in front of JS and AF (or at all), rather than allowing and encouraging him to do so.

93. We consider it more probable that JS and AF misinterpreted what they were witnessing and that they mistook encouragement for coercion. They would have been right to think that the Appellant was keen that KK should drink the lemonade. The fact that KK subsequently spat some of it out and regurgitated much, if not all, of the rest might have suggested to them that he had not wanted to drink it, particularly if they were not aware that KK had originally asked for a drink. It is possible also that the fact that the Appellant was holding the can, rather than having handed it to KK, contributed to their misinterpretation.

94. For similar reasons, we consider it improbable that the Appellant tried to use paper kitchen towel and her hand to prevent KK from spitting out what he had regurgitated. It is improbable that she would have thought that appropriate and therefore improbable that she would have demonstrated it to JS and AF.

95. We are conscious that JS and AF have made quite specific allegations of the Appellant raising KK's chin with her fingers and holding the back of KK's head while holding a tissue over his mouth, whereas the Appellant has denied touching KK at all, saying that there was no need to do so because he was sitting upright on his bed and that children with autism do not like being touched. We consider it to be possible that, despite her denials, she did touch KK but, if so, we are satisfied that it was not with a view to forcing him to drink or to preventing him physically from spitting anything out, because we consider it to be so improbable that that was her intention. She might well have been trying to discourage KK from spitting out what was in his mouth and to encourage him to swallow it instead and she might have held a paper kitchen towel loosely over his mouth while doing so in order to be ready if he did spit it out. She might also have wiped his mouth and chin when he did start spitting it out. In either event, it is possible that she instinctively supported the back of his head at the same time. (In her representations to DBS (*DBS* p.303, paragraph 2), she said that she put the can down when she opened the tissues.)

96. There is also the allegation that KK said to someone that the Appellant had told him lies and hurt his chin. We have not been told the context in which KK made his statement and we have no evidence as to KK's reliability on such issues or, indeed, as to the reliability of the record. We do not know to whom he was speaking and there is no description of an injury. There is a reference to a "KK Allegations Log – 12/01/20" in AL's management reports (*DBS* pp. 39 and 42) but DBS has not obtained that document and it seems unlikely that it would have helped much as to the nature of any injury, since AL was unable to say at the disciplinary hearing how KK thought that the Appellant had hurt him. (At one point, it appears to have been suggested that KK's claim was made on 17 June 2019 (*DBS* p.40), rather than on 12 January 2020, but that appears to have been a mistake unless it was a reference to an earlier – and irrelevant for present purposes – record of a complaint by KK (mentioned by the Appellant in the disciplinary interview at *DBS* p.93).) It is significant that neither JS nor AF suggested that the Appellant actually injured KK.

97. We consider that the evidence of KK's alleged allegation is insufficient to support the allegation that the Appellant was forcing him to drink and to swallow what was in his mouth. It is possible that he said that the Appellant had hurt his chin but, if so and if she did, we are not satisfied that the hurt was non-accidental or more than trivial – perhaps the result of her momentarily holding the can or her fingers against his chin or of her wiping his chin with a piece of kitchen towel.

98. In any event, even if the Appellant did touch KK, we are not satisfied that she did so with a view to forcing KK to drink and to swallow what was in his mouth. Therefore, on the evidence before us, we are not persuaded that DBS's Allegation 2 is made out.

99. More importantly, we are not satisfied that the Appellant harmed or endangered KK by what she was doing, save possibly accidentally and to a trivial extent. We are not satisfied that she acted in an aggressive or coercive manner likely to cause KK any emotional harm or to cause him to choke. On the contrary, we consider that her behaviour was appropriate in the context of encouraging a teenage child, who was verbal and able to indicate his own wishes, but also weakened and at grave risk of dehydration, to take a few drops of liquid.

100. In making our findings, we have, again, not been assisted by DBS's reasoning. Initially, at the minded to bar stage, DBS first considered whether JS and AF were credible witnesses and referred to the record of KK's statement and then said (at *DBS* p.321) –

> "… [the Appellant] admits she provided [KK] with a drink and had a tissue near his face, she only denies the assault on KK, and then immediately makes claims that the two care staff are trying to get in first before she reported them for leaving her, this MO is exactly the same as the previous proven allegation in relation to her behaviour with JP, and provides a defensive pattern in order to deflect from her own behaviour. [The Appellant] has no evidence to support that she did not display these behaviours, and there are 3 witnesses stating that she did, and therefore on the balance of probabilities this allegation is found proven."

Having received the Appellant's representations, DBS added –

> "[The Appellant's] representations support the finding of fact made as she continues to make allegations against staff members and provides no credible evidence as to why KK would support the staff members [sic] statements that she had hurt him. Although she has provided a statement from another carer who states that she was on duty that evening and saw nothing of concern, this carer had only known [the Appellant] for a very short period of time, and all evidence provided shows that there was [sic] only the two carers who provided statements, [the Appellant] and KK in the room at the time of this particular incident, as she stated herself that when the two carers left she was on her own. This finding of fact therefore remains proven."

101. Again, as in relation to Allegation 1, DBS has rejected the Appellant's evidence because she has made allegations against the complainants, and it has done so on what appears to be an assumption that any counter allegation must be untrue and that there is no need to consider its truth before holding it against the subject of the complaint. No real consideration was given as to whether the Appellant's account was more probable than that of the complainants and, in particular, no consideration was given to her evidence as to her motivation in doing what she was doing.

102. Moreover, we accept the principal point raised in Mr Chiffers' first ground of appeal, which is to the effect that DBS failed properly to consider the character evidence provided by the witnesses who made statements supporting the Appellant. Mr Lewis accepted that such evidence was potentially relevant, even though the witnesses were not present at the time of the material incident, because the Appellant was entitled to argue that the evidence showed that she usually behaved in a caring manner and, if that were accepted, the fact that she usually behaved in that way made it less likely that she behaved improperly at the time of the relevant

incident. Obviously, such character evidence is likely to be outweighed by cogent evidence of a person who has actually witnessed the relevant incident, but it must properly be weighed in the balance when determining whether to accept that other person's evidence. Mr Lewis submitted that, while a better decision would have made it clear that that exercise had been undertaken, we should not too readily assume that it had not been undertaken. However, we consider that the natural reading of the reasoning that there was "no evidence" supporting the Appellant and "3 witnesses" against her is that that exercise was not undertaken and, at the very least, DBS's reasoning is insufficient to show that it was. In the circumstances of this case, we consider that the character evidence was important. DBS did have regard to it at the stage of considering the appropriateness of barring the Appellant, where it found that she lacked empathy towards KK and the staff about whom she had made allegations, but that there was "no evidence of any other lack of empathy towards other residents, outside of this role" (*DBS* p.328). We find that an odd finding and it perhaps shows why DBS should have considered the character evidence when making its findings of fact.

103. It will be apparent from our decision that we also accept, at least partially, many of the other points raised by Mr Chiffers in his grounds of appeal. However, it is unnecessary for us to say any more about those grounds.

Removal from the Lists

104. It is common ground that, in the light of the Court of Appeal's decision in *Disclosure and Barring Service v AB*, we may exercise our power under section 4(6)(a) of the 2006 Act to direct DBS to remove the Appellant from the Lists only if that is the only decision that DBS could lawfully make. Mr Lewis told us that he had no instructions as to what DBS's view would be as to the appropriateness of barring the Appellant were we to accept her case, which we have largely accepted.

105. We have taken the view that a strict approach must be taken to whether or not a person has engaged in "relevant conduct". The definitions of "relevant conduct" in paragraphs 4 and 10 of Schedule 3 are deliberately drawn very broadly and so a strict approach inevitably means that, when making findings of fact, the Upper Tribunal may find that an appellant has engaged in "relevant conduct" even though the conduct is such that no reasonable decision-maker in DBS could ever consider it made it appropriate to include that person in either the Children's Barred List or the Adults' Barred List. In such a case, it would be unlawful for DBS to include the appellant in either List (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223) and the Upper Tribunal is therefore required to direct that the Appellant be removed from the Lists. In our judgment, this is such a case.

106. In relation to Allegation 1, we have found that the Appellant placed KK at a risk of emotional harm only because she criticised JP's conduct in front of KK. We have found that she did not raise her voice to JP and that she intervened only because she considered that JP was inappropriately allowing KK to play with his telephone, when KK should have been asleep and JP should have been encouraging him to go to sleep. In its reasoning, based upon its findings that the Appellant had not only raised her voice to JP but had also wrongly told KK that he had no choice as to who provided care to him, DBS referred to what it called the Appellant's "'I know best' attitude" (*DBS* p.326), implying that she did not know best, and to her irresponsibility (*DBS* p.329). However, in this instance, our view is that she clearly did know better

than JP and it was he who was being irresponsible in disrupting KK's routine. We have found that she did not remove a choice that KK realistically had and so the basis of DBS's finding of irresponsibility falls away. Moreover, she acknowledged straightaway, when the employers were investigating JP's complaint, her error in confronting JP in front of KK and her employers did not consider that any formal disciplinary sanction was required, far less dismissal. Her error was no more than a lapse of judgment and we are satisfied that it could not reasonably be regarded as evidence of irresponsibility. We are therefore satisfied that no-one could reasonably consider that barring the Appellant was justified on the basis of our findings as regards Allegation 1.

107. We have not found Allegation 2 proved and we have found that the Appellant neither harmed KK nor placed him at any risk of harm on 12 January 2020, save possibly to a trivial extent and accidentally while appropriately trying to encourage KK to take liquid. Rather than displaying an "I know best" attitude and acting without empathy towards KK and irresponsibly and recklessly, we are satisfied that she acted appropriately and in a caring manner. Even if she did accidentally hurt KK's chin and notwithstanding her lapse of judgment in her dealing with JP some months earlier, we are satisfied that no-one could reasonably consider that barring the Appellant was justified in the light of our findings.

108. Accordingly, we direct DBS to remove the Appellant from both the Children's Barred List and the Adults' Barred List.

Mark Rowland
Deputy Judge of the Upper Tribunal