PC v Disclosure and Barring Service
[2023] UKUT 309 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2021-000426-V**
ADMINISTRATIVE APPEALS CHAMBER

ON APPEAL FROM:
Appellant: **PC**
Respondent: **Disclosure and Barring Service**
DBS Ref No: **DBS6191**
Customer ref: **00949735242**
DBS ID Number: **P0003S5W9VF**

Between:

PC

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Jones**
Tribunal Member John Hutchinson
Tribunal Member Dr Elizabeth Stuart-Cole

Hearing date: 16 June 2023
Decision date: 31 July 2023

Representation:
Appellant: Callistes Solicitors
Respondent: Mr Dominic Bayne, Counsel instructed on behalf of the DBS

DECISION

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

The decision of the Disclosure and Barring Service to include the Appellant's name on the Children's and Adults' Barred Lists taken on 9 November 2021 did

not involve a mistake on a point of law nor material mistakes in findings of fact. The decision of the DBS is confirmed.

The Upper Tribunal further directs that there is to be no publication of any matter or disclosure of any documents likely to lead members of the public directly or indirectly to identify the Appellant, witnesses, complainants or any person who has been involved in the circumstances giving rise to this appeal.

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

Introduction

1. The Appellant ('PC') appeals the decision of the Respondent (the Disclosure and Barring Service or 'DBS') dated 9 November 2021 to include his name in the Children's (CBL) and Adults' Barred Lists ("ABL") pursuant to paragraphs 3 and 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the Act").

2. The DBS decision was to include PC on both the children's and adults' barred lists on the grounds that he put vulnerable adults at risk of harm by breaching Covid restrictions in a hospital setting on 24-25 January 2021 (and if that conduct was repeated in relation to children, would have put children at risk of harm).

3. Permission to appeal was granted by the Upper Tribunal Judge on 3 March 2022 in respect of the grounds raised by the Appellant in the notice of appeal.

4. We held an oral hearing of the appeal in Field House, London on 16 June 2023. The Appellant attended and was cross examined. He was represented by a representative of Callistes solicitors. The Respondent DBS was represented by Mr Dominic Bayne of counsel. We are grateful to them both for the quality of their written and oral submissions.

Rule 14 order - Anonymity

5. We make an order that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify the Appellant or any person who had been involved in the circumstances giving rise to this appeal (witnesses or complainants) pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008. We were satisfied that the Appellant, should not be identified, directly by name or indirectly, in this decision but referred to as 'PC' (or 'the Appellant).
6. We also make an order under rule 14(1)(a) that no documents or information should be disclosed in relation to these proceedings that would tend to identify the Appellant or any person who had been involved in the circumstances giving rise to this appeal. Any documents sought to be disclosed would need to be redacted for identifying information
7. We make a further order under rule 14(1)(b) and (2) prohibiting the publication or disclosure of any information or document which may lead members of the public to

identify any of the individuals (witnesses and complainants) relied on in the Respondent's bundle of evidence and the Appellant himself. Identifying the Appellant himself may also lead to the identification of any complainants or witnesses. The individuals listed in the Respondent's bundle of evidence are to be referred to in the manner set out therein.

8. Identifying the Appellant himself may also lead to the identification of any complainants or witnesses. Further, the Appellant is the subject of misconduct allegations which took place in a secure hospital. We are satisfied that identifying him at this stage may lead to serious and disproportionate harm to his reputation and employment prospects (an interference with the right to private life under article 8 of the ECHR) when the barring decision of the Respondent is not published generally to the world.

9. There is an expectation and legal prohibition that the name and identity of the Appellant as appearing on a barred list (and whomever is included on the barred lists) is not publicised to the world or generally (it is known by the Appellant, the DBS, and any other party who may seek to conduct a DBS check upon him eg. a prospective or current employer). We also rely on the further reasons explained in *R (SXM) v Disclosure and Barring Service* [2020] EWHC 624 (Admin), [2020] 1 WLR 3259. In that case the victim wanted to know the outcome of the referral to DBS. The Administrative Court held: (a) disclosure was not consistent with the statutory structure; (b) refusing to disclose was neither unreasonable nor disproportionate; and (c) there was no positive obligation to disclose under the Article 8 Convention right. The public interest in the protection and safeguarding of vulnerable groups is sufficiently protected by the barring decision itself and identification of the Appellant's name only to prospective employers or those otherwise entitled to obtain information regarding him from the DBS.

10. Identifying the Appellant may lead to the identification of all the parties, complainants and witnesses who are to be anonymised / not identified by virtue of the other orders being made and who may otherwise be identified or linked to the Appellant by virtue of the evidence in the case. Having regard to the interests of justice, we were satisfied that it was proportionate to give such directions. This is for the reason that revealing the identity of any of the witnesses or complainants to the public would be likely to cause the complainants and the witnesses (residents, patients, healthcare assistants or nurses in a secure hospital) emotional or psychological harm as they themselves were vulnerable, the potential victims of harmful conduct, or they had an expectation of privacy. The Appellant has not been prejudiced by anonymising the witnesses – he has been aware of their identities throughout and has been able to identify them to answer their evidence and allegations.

11. We therefore make an order prohibiting the disclosure of any information that would be likely to identify the Appellant, complainants or witnesses.

The background

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

13. The essential factual and procedural chronology is as follows:

04.08.05 PC commenced work as a Support Worker within a secure hospital [p37]
21-23.01.21 PC takes a Covid test
23.01.21 PC takes another Covid Test
24.01.21 PC attends work, allegedly whilst waiting for the test result of one of the tests; & fails to wear PPE
25.01.21 PC attends work, allegedly whilst waiting for the test result of one of the tests; fails to wear PPE; and fails to leave the hospital promptly on receiving a positive result
09.02.21 PC is dismissed for gross misconduct [p68-71]
12.03.21 PC's former employer refers his conduct to the DBS [p35-41]
06.04.21 DBS sends PC an early warning letter [p26-7]
07.09.21 DBS sends PC a Minded to Bar letter, with Annex A [p28-32/p82-6]
29.10.21 PC's Representations to DBS [p72-3]
09.11.21 DBS Final Decision Letter [p8-12/p94-8]
23.11.21 PC's application for permission to appeal [p1-7]
03.03.22 PC is granted permission to appeal [p23-5]
25.05.22 DBS's Submissions on the Appeal [p124-9]
08.07.22 PC's statement for the purposes of his appeal [p130-2]

14. The Appellant was employed as a support worker with a Health Group. He worked in a rehabilitation hospital which provided recovery pathway services to individuals with care and rehabilitation needs including those suffering with mental illness, learning disabilities and autism.

15. The events in question occurred at one of the peaks of the COVID-19 pandemic in the UK – in January 2021.

16. The case was referred to the Respondent following the Appellant's dismissal for gross misconduct on 9th February 2021 for failing to self-isolate and attending work on 24th and 25th January 2021 whilst waiting for the results of a Covid Test along with failing to wear correct protective equipment (PPE).

17. On 23rd March 2021 the Appellant's case was referred to the Respondent. He had been dismissed for gross misconduct on 9th February 2021 following a finding that he had failed to self-isolate and had attended work whilst waiting for the results of a Covid test and that he had failed to wear correct PPE. The allegations found proven related to behaviours on 24th and 25th January 2021.

18. The Appellant was sent a Minded to Bar ('MTB') letter from the DBS dated 7th September 2021 [28] in which it was indicated that he worked in regulated activity and that on balance of probabilities it appeared he had:

• On 24th January 2021 and 25th January 2021 attended work as a support worker whilst awaiting results for a Covid 19 test, placing patients and colleagues at risk; and

• On 24th January 2021 and 25th January 2021, whilst employed as a support worker failed to wear PPE correctly placing patients and colleagues at risk.

19. It was stated by the DBS that the allegations would amount to relevant conduct in relation to children and adults.

20. The Appellant served representations on 29th October 2021 [13-14] in reply.

21. The DBS issued a final barring decision letter dated 9th November 2021 [8-12] whereby PC was informed he had been placed on the Adults' and Children's Barred Lists.

22. The Appellant filed his appeal on 23rd November 2021 [1-7] and he was granted permission to appeal on each of the grounds set out in the notice of appeal [23].

23. The Appellant filed a Notice of Appeal (UT10) to the Upper Tribunal ('UT') on 23rd November 2021 [7] in which he claimed that there were errors of law on the Respondent's part and that the barring decision was irrational and/or unlawful. The UT's determination of permission to appeal on 3 March 2022 [23] granted the Appellant permission to appeal on each of the grounds set out in the notice of appeal.

The Barring Decision subject to appeal

24. The allegations considered by DBS and findings it made are set out in full in the DBS's Rationale Document (its Barring Decision Process Document) and in the final barring Decision letter itself. The DBS made a finding that the Appellant had been engaged in regulated activity and then made two findings on the balance of probabilities as follows:

'We are satisfied that you meet the criteria for regulated activity because you have previously been employed as a Senior Support Worker and have requested DBS checks for both the Children's workforce and the Adults' workforce.

We have reviewed all the information we hold and are satisfied of the following:

On 24/01/2021 and 25/01/2021 you attended work as a support worker whilst awaiting results for a Covid-19 test placing patients and colleagues at risk.

On 24/01/2021 and 25/01/2021 whilst employed as a support worker you failed to wear PPE correctly placing patients and colleagues at risk.'

25. Having found the two allegations proven, DBS came to the further conclusion that PC had engaged in "relevant conduct" in relation to vulnerable adults, within the meaning of the Act, specifically conduct which harmed or endangered a vulnerable adult or was likely to harm or endanger a vulnerable adult. The DBS then came to

the further conclusion that it would be appropriate and proportionate, in all the circumstances, to include PC on the CBL and ABL for the reasons it set out.

26. The reasoning within the DBS's barring decision letter and the consideration of appropriateness and proportionality was as follows:

'When reaching this decision we have fully considered your representations as follows:

You have stated that you did not place patients and colleagues at risk as on 24/01/2021 you tested negative for Covid-19. The DBS is satisfied that at the time that you attended work you did not yet know the result of your Covid-19 test, however you failed to self isolate in accordance with Government regulations.

You stated during your employer's investigation that on the morning of 25/01/2021 you read an email sent to you confirming that you had tested positive for Covid-19. This is corroborated by the GP records you provided in representations which indicates a positive Covid-19 test result on 22/01/2021 and states that a text message was sent to the patient (yourself). The DBS therefore finds that by attending work prior to knowing your test result and by not checking your test result sooner, you did place others at risk and the allegation is substantiated.

You have stated that when you were shown on CCTV not to have worn correct PPE you were in corridors and therefore not face to face with patients or were in an office with a colleague who was also not wearing a mask.

Your employer's policy clearly stated that staff were to wear masks in the building at all times. By failing to wear PPE in corridors or when with colleagues there was an increased risk of transmission which placed others at risk. The actions of your colleagues are not deemed to mitigate your own actions and the fact that the CCTV footage is reported to have shown you both then reaching for masks indicates that you knew your actions were wrong.

After viewing the email indicating your positive Covid-19 result you continued to walk through the hospital without PPE indicating a disregard for the rules and placing the others at risk. The DBS is therefore satisfied that the allegation that you failed to wear PPE correctly placing patients and colleagues at risk is substantiated.

The DBS is satisfied you have engaged in conduct which harmed or could harm children and vulnerable adults. This is because that you have placed patients and colleagues at risk by attending work whilst awaiting the result of a Covid-19 test and by failing to wear correct PPE in the workplace.

You are an experienced Senior Support Worker having worked in the role since 2005 and prior to this there have been no concerns regarding your conduct. Your representations provide several references from colleagues including Registered Nurses, several of whom have worked with you for many years and who state that; you always followed PPE and Covid procedures, you encouraged others to socially distance and wear masks and that they have no concerns about your conduct.

Whilst this indicates that you have previously conducted yourself appropriately and in accordance with policies and procedures, this makes it significantly more concerning that on this occasion, you acted in such an irresponsible and reckless manner by attending work whilst unaware if you had Covid and also by failing to wear correct PPE contrary to the company's policy.

You state that you later tested negative for Covid and therefore had not put anyone at risk, however, you also claim that you were unaware of the outcome of your test at the time you attended work. Furthermore, once you became aware of the positive test result on the morning of 25 January 2021 you continued to walk around the building without correct PPE therefore knowingly placing others at risk.

Not only were you in clear breach of the policy which stated that masks must be worn at all times within the building, but your responses that you were not face to face with patients or that your colleague was not wearing a mask demonstrates your failure to recognise or show any regard for the potential for the virus to spread to others in the building or between colleagues.

The DBS recognises that you have a previously unblemished record and that your colleagues provide excellent references with regards to your adherence to Covid 19 and PPE policy prior to the recent behaviour. However, despite this it has been found proven that on the weekend of 24 January 2021, at a time when the country had been placed into a second national lockdown and the serious implications of Covid were widely publicised, as an experienced Senior Support Worker you knowingly breached these policies and placed your patients and colleagues at risk. Your decision making on this instance was so seriously flawed that the DBS remains of the view that the potential future risk, should you make similar flawed decisions when caring for vulnerable adults, is too serious to be ignored. The DBS is therefore now satisfied that it is an appropriate decision to include you in the Adults' Barred List.

If you were to breach policies and procedures put in place to safeguard the health and wellbeing of children this could similarly result in serious harm. The DBS is therefore also now satisfied that it is appropriate to include you in the Children's Barred List.

When assessing the proportionality of inclusion in the Barred Lists consideration must be given to your rights under the European Convention on Human Rights (ECHR).

The DBS recognises that you had been in your role since 2005 indicating a significant career in regulated activity. Inclusion in the Barred Lists would prevent you from working or volunteering in regulated activity with vulnerable adults and children. This could have an impact on your future employment opportunities and earning potential and may render any job specific training you have undertaken unusable.

The DBS acknowledges that there may be some personal stigma associated with inclusion in the Barred Lists, however, this would be known only to those whom you chose, or were legally required, to make a disclosure.

There was no police involvement related to the behaviour and the DBS is not aware of any other existing safeguards.

Having reviewed the impact inclusion in the Barred Lists would have on your rights, against the significant risk which the DBS finds you pose to vulnerable groups and the absence of any existing safeguards, the DBS is now satisfied that it is a proportionate measure to include you in the Adults' Barred List and the Children's Barred List.'

Appellant's Grounds of Appeal

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

28. PC's grounds of appeal can be summarised as:
    i. That the DBS made a material mistake of fact in finding that he had attended work whilst waiting for the outcome of a Covid test.

    ii. That the DBS made a material mistake of fact in finding that he had exposed vulnerable adults to risk by failing to wear appropriate PPE.

    iii. That the DBS made a mistake of law in including him with both lists, on the grounds that it was acting irrational or disproportionately.

29. The Appellant relied on these three grounds of appeal at the hearing of the appeal before us on 16 June 2023.

30. The Appellant relies on his grounds of appeal and submits that the barring decision was based on material mistakes of fact or mistakes of law (the decision was irrational and/or disproportionate which amounts to an error of law).

The evidence in the appeal

31. The DBS relied on written evidence from 10 witnesses contained in their bundle of evidence. These included former colleagues who were employed by the secure hospital at the relevant time. There were also still photographs taken from CCTV images within the hospital at the relevant time, typewritten notes of interview with PC by his employer (questions and answers) and a confidential employer's investigation report. This was the evidence relied upon in making the barring decision and in defending the appeal. The relevant evidence is referred to in the discussion section below and we make findings of fact based upon it and the Appellant's evidence.

32. The Appellant provided a 3-page witness statement dated 8 July 2022 (p. 130-132) signed with a statement of truth. He also relied on other evidence he had supplied to the DBS such as character references and the submissions and representations made on his behalf to the DBS by his solicitors prior to his barring which were contained in the hearing bundle.

33. The Appellant was cross examined during the hearing and denied the allegations of relevant conduct. It goes without saying that this written and oral evidence was not available to the DBS when making its barring decision.

34. Again, we make findings of fact in relation to this evidence in the discussion section below and give our reasons therefor. In summary, we have come to the conclusion that his written statement as set out below and the Appellant's oral evidence were

not substantially reliable nor credible for the reasons we will give within the discussion section.

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

> 2. I have been working as a care assistant since 5th August 2005 with an unblemished record. I am very passionate about caring and fully understand my responsibilities towards service users. I have never ever put their welfare or health at risk and will not even dream of doing so. My references which formed part of my representations of 29th October 2021 to the Respondent speak for themselves.
>
> 3. It is not true that I attended work on 24th January 2021 without knowledge of the outcome of my Covid-19 test. For avoidance of doubt, I took two tests one on 21st January or 22nd January 2021. On 23rd January 2021, I was informed by email that the test was positive. Upon checking my email and read that I have been tested positive for Covid-19, I took another test on the same day. On Sunday morning at 2:50 a.m., I received a text from Gov.UK confirming that my test was negative. For avoidance of doubt, on 24th January 2021, I was fully aware that I was tested negative before my shift started at 08:00 a.m. as I read the above text around the same time that I received it. Copy
> of the text is attached and shown to me marked ***"PC1".***
>
> 4. A letter from my GP surgery namely [GH] Surgery was attached to my representations of 29th October 2021 and even there, it made mention of my negative result of 24th January 2021. They did not send me a text as I was negative but they sent me a text in relation to the result of my test taken either on 21st or 22nd January 2021 which was positive. It is their practice for them to send you a text when you have been tested positive. However, I did receive a text from Gov.Uk as mentioned above.
>
> 5. I did mention about the result of the test of 23rd January 2021 in that it was negative to AC but the same was not noted by him as he is not HR trained and worked as the Head of Maintenance (Handyman).
>
> 6. The statements from some of my former colleagues relate to the result of test that I took either on 21st or 22nd January 2021 not in relation to the result of the test that I took on 23rd January 2021. I never showed anyone any email pertaining to the positive result which I received on Saturday 23rd January 2021 as I had no reason to. During the training, we were discussing Covid-19 and its impact on service users. Consequently, I mention to some of my colleagues about my positive results on 23rd January 2021 and negative on 24th January 2021 since we were on the topic. Nobody seems to care about the negative results as they all seem to have concentrated on the positive results. The trainer then reported me to my line manager who asked me to collect all my personal properties and leave the building. The training took place at my place of work. I was left with no choice but to collect my personal belongings and leave the building as instructed.
>
> 7. On 24th January 2021 and 25th January 2021, whilst I accept that in some of the CCTV footage adduced, I did not have a mask but that was because I was not in the presence of any patients as I was merely going through the corridors. It is important that I was instructed by my line manager to collect my personal items and leave the building.
>
> 8. In the same footage, it can be seen that my colleague equally did not have her mask on as there were no patients around. Whilst I equally accept that in the other CCTV footage

adduced showing my mask not to be covering my nose; however that because I did not realise that the mask has slipped down as it is a common problem with such masks which often slipped down without the person realising. I am unreservedly remorseful for not realising that my mask has slipped down. It is important to note that the CCTV footages have been adduced by the same AC who is not SIA trained.

9. The Respondent did not fully engage with my representations of 29th October 2021.

10. In light of the above, I urge this Tribunal to allow my appeal and allow me to resume my career as Health Care Assistant.

Law

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

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

> (a) Paragraph 9 of Schedule 3 to the Act, which sets out the provisions in relation to "relevant conduct". It provides that, following an opportunity for and consideration of representations, DBS "must" include a person on the List if: (i) it is satisfied that they have "engaged in relevant conduct"; (ii) it has reason to believe that they have been (or might in future) be "engaged in regulated activity relating to vulnerable adults"; and (iii) it is satisfied that it is "appropriate" to include them.
>
> (b) Paragraph 10(1) of the same, which sets out the meaning of "relevant conduct". It includes: (i) "conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult"; (ii) "conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him".
>
> (c) Paragraph 10(2) of the same, which provides that conduct "endangers a vulnerable adult if" among other things it: (i) "harms" a vulnerable adult; or (ii) puts a vulnerable adult "at risk of harm".

38. Paragraph 3 and 4 of Schedule 3 to the Act mirror paragraphs 9 and 10 but in relation to children.

39. The most relevant authority to address within the body of the decision is on the extent of the jurisdiction for the Upper Tribunal to determine mistakes of fact by the DBS and make its own findings of fact. This was outlined in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC) at [51]:

> 'Drawing the various strands together, we conclude as follows:
> a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).

b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.
c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.
d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).
e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.
f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.
g) The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.'

The Appellant's submissions on the grounds of appeal

40. In summary, it is the Appellant's case that:

a. The investigating officer, AC was not HR trained and worked as the Head of Maintenance (Handyman). At the time of the interview with him, the Appellant mentioned the test of 23rd January 2021 and that the result pertaining to the same was negative to AC but the same was not noted.

b. The Appellant was aware that the test was negative prior to attending work on 24th January 2021 and this was mentioned AC who failed to note the same. Hence, he did not place patients and colleagues at risk on 24th January 2021 as alleged. It follows that having failed to grapple with the crux of the matter as set out above; the Respondent erred by coming to the conclusion to bar the Appellant.

c. The Appellant understood the impact and seriousness of Covid-19 and did not knowingly put the lives of service users or colleagues at risk. His records in the care industry speak for themselves. The references attached to his representations of 29th October 2021 from colleagues demonstrated his general demeanour and dedication as a care assistant.

d. From January 2021 until 9th November 2021, the Appellant was allowed to work in the Care Industry unrestricted and without any further incident particularly pertaining to mask or Covid-19 testing.

e. The Respondent erred by not engaging with the representations of the Appellant dated 29th October 2021 but merely relied on the notes from the investigation which were erroneous as set out above.

f. The Appellant accepts that in some of the CCTV footage adduced that he did not have a mask but that was because he was not in the presence of any patients as he was merely going through the corridors. In the same footage, it can be seen that his colleague equally did not have her mask on as there were no patients around.

g. The Appellant further accepts that in the other CCTV footage adduced his mask was not over his nose, however that because he did not realise that the mask has slipped down as it was a common problem with such masks which often slipped down without the person realising. He is unreservedly remorseful for not realising that his mask has slipped down.

41. It was submitted that the Appellant's Witness Statement, especially the text message from GOV.UK received on 24th January 2021 at 2:50 a.m. [134-136], supports the fact that he knew that he had tested negative when he attended work at about 08:00 a.m. on 24th January 2021. It was therefore submitted that it is clear that the Appellant knew the result of his Covid-19 test when he attended his shift on 24th January 2021 posing no risks whatsoever to the service users.

42. It was argued that the Respondent was aware of the negative test on 24th January 2021 as part of the Appellant's representations on 29th October 2021 [19], but yet concluded that the Appellant was unaware of the results of his test. It is submitted that the Appellant's representations of 29th October 2021 were not properly addressed by the Respondent.

43. Whilst the Appellant accepts that in some of the CCTV footage he was not wearing his masks as it was in the corridors with no patients in sight, he equally accepts that in some of them, his mask was not on properly, for which he is remorseful. It was submitted that barring the Appellant on this finding is disproportionate.

44. The Applicant submits that each ground of his appeal is made out and his appeal should be allowed.

Discussion and Decision

45. We have examined all the evidence in the case, both that which was before the DBS and that submitted by the Appellant as part of his appeal (which was not available to the DBS at the time it made its Decision) and make findings of fact as set out below.

46. The evidence that was before the DBS when it made its Decision did include factual and legal representations dated 29 October 2021 on behalf of the Appellant. The factual representations made, denying the allegations, were in similar terms to his witness statement dated July 2022 (but less detailed). These were considered but rejected by the DBS in its Rationale Document with its reasoning explained therein.

47. In light of these, we will consider whether the DBS made mistakes of fact in accordance with the approach set out in *PF v DBS*. The burden of proof remained on the DBS when establishing the facts and making its findings of relevant conduct in its barring decision. Thereafter on the appeal to the UT, the burden was on the Appellant to establish a mistake of fact (see *PF* at [51]):

    '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.'

48. Furthermore, '*In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose…. In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it...The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise*.'

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

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

51. We are not satisfied that the Appellant was a reliable and credible witness. We set out our reasoning for this in the section below when addressing Ground 1. In essence we are satisfied that the Appellant's evidence is inconsistent with the contemporaneous evidence and a number of witnesses who gave evidence against him. His written and oral evidence to the Tribunal was also internally inconsistent and contradicted his earlier account given to his employer.

52. Finally, we found that the Appellant's answers in cross examination tended towards a bare denial and the assertion that all the witnesses the DBS relied upon were wrong. He maintained his behaviour was exemplary at all times as set out in his witness statement - this demonstrated a lack of insight or an inability to make any reasonable concessions. The Appellant's 'new' explanation, which he has relied on since July 2022, for attending work having received a positive Covid Test result was implausible and inherently unlikely.

Ground 1 – mistake of fact? - Attending work while awaiting a Covid test result

53. Having considered all the evidence, including the Appellant's oral evidence, we are satisfied on the balance of probabilities that there is no mistake of fact in the first

finding of relevant conduct: that the Appellant on 24th and 25th January 2021 whilst employed as a support worker attended work whilst awaiting results for a Covid 19 test placing patients and colleagues at risk.

54. Likewise, we are satisfied that there was no mistake of law in the finding - it was clearly a finding open to the Respondent on the evidence provided to it in the referral. It is clear from the Rationale Document that the Respondent carefully considered the same and gave rational reasons for the finding [102].

55. The DBS's finding of fact in relation to this issue appears at [10] (see also [108]):

'Whilst it cannot be determined at what point [PC] became aware of the positive test result, it can be proven that [PC] attended work whilst awaiting a test result, did not make his employer aware that he was awaiting a test result, and failed to actively monitor his emails when he was aware that his test results would be imminent.'

56. That finding was based upon contemporaneous evidence provided by PC's former employer, in particular:

a. The employer's disciplinary investigation finding that during a break in some training on Monday 25 January 2021, PC checked his emails and found an email dated Saturday 23 January 2021 confirming he was infected with Covid. As a result, all course attendees had to go home and self-isolate [43].

b. The accounts of interviewee 3 [p53], interviewee 4 [p54], interviewee 8 [p58] and interviewee 9 [p59] are only consistent with PC learning that he was positive for Covid between about 10.30 and 11am on Monday 25 January 21.

57. There is clear evidence in the information provided within the referral that the Appellant received a positive test result when he was at work on 25th January 2021. Interviews were carried out with colleagues of the Appellant (see interview questions for staff flags 4 -13 in Annex A) in which they provided significant and detailed accounts about when the Appellant became aware of his positive Covid test on 25th January and how they were informed. Some of the Appellant's colleagues were informed by other staff members but some directly by the Appellant himself, for example:

- *[53] – How did [PC] make you aware that he had received a positive result and at what time?*

  When I came back from break 1030ish everyone had moved to the fron of the room apart form PC

  What happened after he had received his result?

  I was shocked and voiced my anger. The trainer was also angry. PC went back into the hospital to get his belongings. We went upstairs to wait for instructions from HR

Was he displaying any noticeable symptoms/and or did he mention feeling unwell at any point during the training session?

I notice had a dry cough frequently

Did he mention at any time that he was awaiting covid results?
No

• [*54] – 'How did [PC] make you aware that he had received a positive test result and at what time?*

'Between 1020 and 1040 PC showed us the result and I said he needed to get out'

• [*58] – 'How were you made aware that [PC] had received a positive test result and at what time?*

'Met him in the first floor corridor and took him up to my office. He told me the result in there. About 11am.'

• [*59] – How were you made aware that [PC] had received a positive test result and at what time?*

'PC told me around 11am'

58. We do not accept the Appellant's explanation in oral evidence that each of these witnesses was mistaken or wrong in their recollection. We do not his explanation at [6] of his witness statement that he told them he had received a positive result in relation to a first test but subsequently received a negative result in relation to a second test.

59. Further, all colleagues who had been in contact with the Appellant were forced to isolate following this incident which is consistent with their evidence being accurate.

60. The Respondent also had before it an interview with the Appellant himself [61] which was provided within the investigation report contained in the referral. In this interview the Appellant indicated that he had requested a Covid test on 20th January 2021 which he attended on 21st January 2021 [61]. He explained that he only took action on 25th January because the results arrived by email on the Saturday but he did not check until the Monday 25th January. He even gave an explanation as to why he had not checked the results on Saturday 23rd January indicating that it was his birthday on the Friday (22nd January) and he was hungover on the Saturday so forgot to check his test results.

61. As the Respondent observed (Rationale document, [104]) 'whilst it cannot be determined at what point [PC] became aware of the positive test result, it can be proven that [PC] attended work whilst awaiting a test result, did not make his employer aware that he was awaiting a test result, and failed to actively monitor his emails when he was aware that his test results would be imminent.' We are satisfied that this is likely to be right.

62. The UT10 and appeal grounds [4] suggest that the Appellant told the investigating officer that the test of 23rd January was negative but the same was not noted. This was repeated in his witness statement and oral evidence. We do not accept his explanation, now relied on, that the investigating officer – the head of maintenance, AC - had poor English and hence made an inaccurate record. It has only been put forward recently as an explanation – and is not consistent with the number of notes made by AC from other witnesses that are consistent with each other.

63. We do not accept the Appellant's written and oral evidence. We do not accept that the Appellant informed the investigating officer of a negative test but no note was taken. It was an important matter and would have been highly relevant to the Appellant's defence to the misconduct investigation. He did not raise this dispute contemporaneously with the investigating officer. It was inconsistent with what is noted as being said by the four witnesses above. It is inconsistent with him leaving the training session and the colleagues having been forced to self isolate after contact with him on 25 January 2021. Therefore, such a suggestion runs contrary to the evidence provided in the referral to the Respondent which came from a number of different individuals.

64. The information contained in the investigation report and associated documents [45] support the finding that the Appellant did attend work whilst awaiting the results of a Covid test (whichever date that test was taken). Whilst it is accepted that there may be some confusion over the number of tests taken (there may well have been more than two in the period 21-23 January 2021), the dates of the tests taken and which gave rise to the positive and negative results, we are satisfied that there was cogent evidence that the Appellant attended work on 25th January 2021 whilst awaiting the result of a Covid test.

65. In PC's own investigatory interview **[**61-2] he conceded that:

> '[QU:] When and how did you receive your test results? If the results were received on sat 23rd why did you only take action on Mon 25th?
>
> [ANS:] Arrived by email on Saturday but I didn't check until Monday during the break while on the Training course. I had my birthday on Friday and enjoyed myself with a lot of drinks and celebrations. As a result of the celebrations I was hungover and tired and because of this I forgot about the impending arrival of the test results leading to me checking them on Monday.'

66. It is implicit from the dismissal letter [68-71] that he did not challenge that finding at his subsequent disciplinary hearing:

> 'When you spoke to HR initially on 25th January, you stated that you were experiencing headaches and cold like symptoms
> …
> You informed us that your test date was 21st January 2021.
> …

I do not accept your explanation that you were unaware of the rules as they keep changing,…'

67. We do not accept the Appellant's evidence that he gave the same account in his investigatory interview and dismissal letter as he is now giving but that both his interviewer and his supervisor wrongly recorded his explanation or refused to listen to him. Again, he suggests that the manager conducting the disciplinary hearing, Mr D, made an inaccurate record and was ill-motivated towards him. We reject this explanation. There is a substantial body of contemporaneous records from various sources which are consistent with each other and inconsistent with the new explanation that the Appellant now relies upon.

68. PC's evidence to the tribunal in his more recent witness statement dated July 2022 [130-2] and oral evidence in June 2023 was that:

a. He went for 2 Covid tests, one on either 21 January 2021 or 22 January 2021;
b. That he was informed on Saturday 23 January 2021 that the first test was positive, which led to him taking the second test on that day;
c. That, at 2.50am on Sunday 24 January 2021 he was informed by text message that the second test from 23 January 2021 was negative (a copy of which text he provided);
d. Accordingly, when he went to work on both Sunday 24 January 2021 and Monday 25 January 2021 he did so knowing he did not have Covid and not awaiting any results (para 3);
e. Therefore when on 25 January 2021 he was at the training session he mentioned that he received a positive test result on 23 January 2021 from the first and earlier test which had been superseded by the second test conducted on 23 January 2021 with the negative result received on 24 January 2021 (see his statement at [6]).

69. We are satisfied that this was a self-serving account, which was given 18 months after the event (in July 2022). It is inconsistent with the earlier explanation he gave to his employer during the investigation and entirely at odds with the contemporaneous evidence obtained by his former employer (all the material obtained in January / February 2021). On this new account, the Appellant would have no need to alert colleagues and others if he had received a negative result on 24 January 2021 from a second test which superseded an earlier positive test on 23 January 2021. His actions were consistent with the contemporaneous accounts - someone who only discovered a positive result on 25 January 2021 while already at work from a test taken on or before 23 January 2021. Likewise, the fact he was experiencing symptoms consistent with Covid motivated him to bring this to the attention of others.

70. In the Appellant's representations to DBS of 29 October 2021, it was stated 'it was confirmed on 24th January 2021 that he was tested negative for Covid-19'. In his appeal grounds dated 23 November 2021 stated, the Appellant's solicitors explained that there were two covid tests as follows:

'2.The Respondent's conclusion that it was satisfied that the Appellant at the time of attending work on 24th January 2021, he did not know the outcome of the test is

erroneous. The text message being referred in the decision letter relates to the outcome of the test on 22nd January 2021 not the test taken on 23rd January 2021, which means the results of the positive test was known on 24th January 201. There is a difference between a text and an email. The Appellant mentioned about the test of 23rd January 2021 and that the result pertaining to the same was negative to the investigating officer, AC but the same was not noted. It important to note that the said AC was not HR trained and worked as the Head of Maintenance (Handyman). He further adduced the CCTV footage despite not being SIA trained.

3.Despite not being sent a text message, the Appellant was aware the test was negative prior to attending work on 24th January 2021. He mentioned to the said AC who failed to note the same. Consequently he did not place patients and colleagues at risk on 24th January 201 as alleged…

71. This explanation, suggesting the Appellant did not receive a text message in relation to the later of the two tests, one which took place on 23 January 2021, is contrary to the account relied on before us that he did receive such a text at 2.50am on 24th January 2021 (and a copy of which text he now relies on).

72. Further and in any event, in neither document dated October and November 2021 did the Appellant's solicitors offer the full explanation above now relied on in his witness statement of July 2022 and before us in June 2023 regarding the sequence of the two tests and results and the Appellant's explanation that he communicated this all to his former colleagues. At no point before July 2022 did the Appellant provide a copy of the text message dated 24 January 2021 (containing the negative result from a test on 23 January 2021) to his employer nor the tribunal. If this evidence really did support his account, we are satisfied he would have provided it an earlier stage in proceedings to his employer and the tribunal.

73. The material relied on by the Appellant, remains consistent with our finding that the Appellant later discovered the result of one of the tests (whether taken before or after the test on 23rd January for which he was sent a negative test on 24th January 2021) while at work on 25 January 2021 by looking at the message on his phone and which result turned out to be positive (and which result he did not know at the time he attended work). Thus, we are satisfied that he attended work while awaiting a Covid Test and not knowing its result and which conduct put other staff and patients at risk of physical harm (the risk of contracting Covid).

74. This finding is also consistent with the Appellant receiving a negative result on 24th January 2021 from a test taken on 23 January 2021 but also going to work while awaiting a result from another test taken on or before 23 January 2021 (whether taken before or after the test from which he received a negative result). It is also consistent with the GP records in which the Appellant was sent a positive result by text on 22nd January 2021 but a negative result was recorded on 24 January 2021 in respect of which no action was taken. Further, there may have been more than two tests taken by the Appellant in the period 21-24th January 2021 which were not all recorded by the GP (such as those taken directly with the national testing service).

75. We reject the Appellant's evidence and account as inconsistent and unreliable. This also supports the DBS's conclusion that the Appellant has not been full and frank, lacks insight and presents a future risk (notwithstanding his previous exemplary record to which his character references speak).

76. For all the reasons set out above we are satisfied that the Respondent's finding of relevant conduct (that the Appellant attended work while awaiting a Covid result, thus placing staff and patients at risk of harm) was established on the balance of probabilities and there was no mistake of fact within it.

77. We dismiss this ground of appeal.

Ground 2 – mistake of fact? - Failing to wear PPE

78. Having considered all the evidence, including the Appellant's oral evidence, we are satisfied on the balance of probabilities that there is no mistake of fact in the second finding of relevant conduct: that the Appellant while at work on 24th and 25th January 2021 failed to wear PPE correctly placing patients and colleagues at risk.

79. Likewise, we are satisfied that there was no mistake of law in the finding - it was a finding open to the Respondent on the evidence provided to it in the referral. It is clear from the Rationale Document that the Respondent carefully considered the same and gave rational reasons for the finding [102].

80. The DBS's findings in relation to this issue is summarised at [107] (see also [108]), and can be broken down into two parts:

a. 'on 24/01/2021 and 25/01/2021, whilst employed as a support worker, [PC] failed to wear PPE correctly
b. placing patients and colleagues at risk.'

81. The first part of those findings is set out more specifically at [115]: '… [PC] failed to wear PPE when talking to a colleague and did not wear his PPE correctly during his shifts, when moving around the hospital and when having contact with other people.'

82. That factual finding is not and cannot realistically be challenged (notwithstanding PC's contemporaneous position in investigatory interview that he was wearing PPE at all times [p62]), given:

a. The CCTV footage showing him without a mask [p48-9] and with an incorrectly applied mask [p50].
b. The comments of interviewees 1, 3, 4 and 8 [p51, 53, 54 & 58];
c. The concessions made on PC's behalf in representations by his solicitors [p72-3]; and
d. His own concessions in paras 7 and 8 of his witness statement [p131].

83. There is no mistake of fact in the first part of the finding.

84. Insofar as the Appellant seeks to challenge the second part of the finding, there can be no mistake of fact that he placed patients and colleagues at risk – not wearing a mask correctly or at all in January 2021 (at a peak in the Covid 19 pandemic) indoors in a healthcare setting and while the Appellant was awaiting a Covid test result (see the first finding of relevant of conduct) would undoubtedly put others at risk of harm (and would be contrary to guidance then in operation). That risk is exacerbated by the fact that he was not wearing a mask on the two days in question when he did not know but was awaiting the result of a Covid test. This is what places him in a different position from other staff (who may or may not have been complying with the rules and guidance) – and in any event, any non-compliance by other staff would not excuse his conduct.

85. It is very difficult for the Appellant to challenge the finding the Respondent made in respect of the second allegation, given his admissions as to the same detailed within his representations on the MTB letter [13] and in his appeal notice 4]. This finding – that on 24th and 25th January 2021 whilst employed as a support worker the Appellant failed to wear PPE correctly placing patients and colleagues at risk is established on the balance of probabilities and on the evidence provided to the Respondent and the concessions the Appellant himself made.

86. The Rationale Document [106] evidences that the Respondent considered the still images from CCTV footage as well as witness statements from colleagues and that the same undermined the credibility of the account the Appellant had initially given in interview in which he denied not wearing the correct PPE [107]. The Respondent took into account the evidence in support of the allegation and that the Appellant's employer's Covid 19 policy was absolutely clear that everyone should wear an approved face mask at all times whilst in the building and that the Appellant's explanation that he was not so doing because he was not in the presence of patients did not excuse his behaviour. We are satisfied that the finding the Respondent made was cogently supported by the evidence before it and there is no mistake of fact nor law in the findings.

87. The Rationale document also demonstrates that (contrary to the Appellant's argument that his representations were not addressed) the Respondent considered his representations in significant detail before reaching its final decision [120].

88. We dismiss this ground of appeal.

Ground 3 – Mistake of law - Proportionality/Irrationality

89. We are satisfied that the DBS did not make any mistake of law in including the Appellant in both lists and that it was not acting irrational or disproportionately in doing so.

90. Within its structured judgment process, (as set out in the Rationale document) the DBS has:

a. Identified 'some concerns' under the 'callousness/lack of empathy' risk factor (arising out of PC's disregard for the health and wellbeing of patients and colleagues) [p114].
b. Identified 'Definite concerns' under the 'Irresponsible and Reckless' risk factor [p115-6].
c. In doing so (contrary to the suggestion in para 6 of PC's Grounds of Appeal [p5]), appropriately taken into account counter-indicators, including the positive references provided by PC as part of his representations.
d. Thereafter, considered the extent to which there are Critical Concerns identified within those risk factors. Again, in doing so (contrary to the suggestion in para 6 of PC's Grounds of Appeal [p5]) it took into account PC's representations, and amended its assessment in light of those representations [p117].

91. That is the sort of risk assessment of which the Court of Appeal approved in *B v ISA* at para 20. We are satisfied that no part of it can be said to be irrational, or *Wednesbury* unreasonable. The DBS is the expert decision maker and we should not interfere with its risk assessment unless it is irrational or disproportionate (or based upon a mistake of fact). We are not satisfied that there are any grounds on which we might interfere with its assessment as to the risk posed by the Appellant.

92. Having identified the extent of the risks, the DBS then carried out a rational proportionality assessment in relation to the barring decision:

a. It appropriately weighed in the balance the risks to the community against the impact of a barring decision on PC; and in particular his future employment opportunities and earning potential, that it may render any job specific training unusable, and the potential for stigma [p118-20].
b. It specifically repeated that proportionately assessment following PC's representations [p120-3].
c. it was the type of careful attempt to strike a balance which the Court of Appeal approved of in *DBS v Harvey*.

93. There was no error of law – no irrationality nor lack of proportionality in the barring decision. It weighed up the impact of barring on the Appellant's private life (for the purposes of Article 8 ECHR) against the public interest in preventing a risk of harm to vulnerable adults and children and came to a rational and proportionate conclusion.

94. We dismiss this ground of appeal.

Conclusion

95. We are satisfied that the grounds of appeal are without merit and the DBS did not err either in fact or law in reaching the finding that the Appellant had engaged in relevant conduct. It is apparent from the MTB and final decision letters and from the Rationale Document that the Respondent carefully assessed and evaluated the evidence before it and reached a conclusion open to it on the evidence.

96. Furthermore, in considering questions of appropriateness and proportionality the Respondent properly addressed its mind to the nature of the Appellant's behaviour, his disregard for health and safety regulations, the potential for his actions to have resulted in serious harm, his past career and the impact upon him of barring [117].

Disposal

97. For the reasons set out above, PC's appeal should be dismissed.

98. We conclude for the purposes of section 4(5) of the Act that there were no mistakes of law in the DBS Decision to include the Appellant on the CBL & ABL. There were no material mistakes of fact upon which the Decision was based.

99. The Decision of the DBS to include the Appellant on the CBL and ABL is confirmed.

Authorised for release: Judge Rupert Jones
Judge of the Upper Tribunal **Dated: 31 July 2023**

The lists and listing under the 2006 Act

1. The Safeguarding Vulnerable Groups Act 2006 ('the Act') established an Independent Barring Board which was renamed the Independent Safeguarding Authority ('ISA') before it merged with the Criminal Records Bureau ('CRB') to form the Disclosure and Barring Service ("DBS").

2. So far as is relevant, section 2 of the Act, as amended, provides as follows:

'2(1) DBS must establish and maintain—

(a) the children's barred list;

(b) the adults' barred list.

(2) Part 1 of Schedule 3 applies for the purpose of determining whether an individual is included in the children's barred list.

(3) Part 2 of that Schedule applies for the purpose of determining whether an individual is included in the adults' barred list.

(4) Part 3 of that Schedule contains supplementary provision.

(5) In respect of an individual who is included in a barred list, DBS must keep other information of such description as is prescribed.'

Children's barred list

3. The relevant provisions (paragraphs 1 to 4) of Part 2 of Schedule 3 to the Act, on the children's barred list, mirror those in paragraph 8 to 11 for vulnerable adults which are provided below.

Vulnerable adults' barred list

4. The relevant provisions (paragraphs 8 to 11) of Part 2 of Schedule 3 to the Act, on the vulnerable adults' barred list, provide as follows:

8(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.

(2) Sub-paragraph (4) applies if it appears to DBS that—

(a) this paragraph applies to a person, and

(b) the person is or has been, or might in future be, engaged in regulated activity relating

to vulnerable adults.

……

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

(5) Sub-paragraph (6) applies if—

(a) the person does not make representations before the end of any time prescribed for the

purpose, or

(b) the duty in sub-paragraph (4) does not apply by virtue of paragraph 16(2).

(6) If [DBS] —

(a) is satisfied that this paragraph applies to the per p 0son, and

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

(7) Sub-paragraph (8) applies if the person makes representations before the end of any time prescribed for the purpose.

(8) If [DBS] —

(a) is satisfied that this paragraph applies to the person,

(b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and

(c) is satisfied that it is appropriate to include the person in the adults' barred list, it must include the person in the list.

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

(a) it appears to [DBS] that the person [—]

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

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

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

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

(3) [DBS] must include the person in the adults' barred list if–

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

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

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

[Emphasis added]

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

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

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

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

material);

(d) conduct involving sexually explicit images depicting violence against human beings

(including possession of such images), if it appears to [DBS] that the conduct is

inappropriate;

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

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

(a) harms a vulnerable adult,

(b) causes a vulnerable adult to be harmed,

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

(d) attempts to harm a vulnerable adult, or

(e) incites another to harm a vulnerable adult.

(3) “Sexual material relating to children” means–

(a) indecent images of children, or

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

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

(5) A person does not engage in relevant conduct merely by committing an offence prescribed for the purposes of this sub-paragraph.

(6) For the purposes of sub-paragraph (1)(d) and (e), [DBS] must have regard to guidance issued by the Secretary of State as to conduct which is inappropriate.

11 (1) This paragraph applies to a person if–

(a) it appears to [DBS] that the person [—]

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

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

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

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

(3) [DBS] must include the person in the adults' barred list if–

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

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

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

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

(a) harm a vulnerable adult,

(b) cause a vulnerable adult to be harmed,

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

(d) attempt to harm a vulnerable adult, or

(e) incite another to harm a vulnerable adult.

5. There are three separate ways in which a person may be included in the barred lists under Schedule 3 to the Act.

6. The first category is under paragraphs 1 and 7 of Schedule 3 to the Act, where a person will be automatically included in the lists without any right to make representations ('autobar'). This is where they have been convicted of certain specified criminal offences or made subject to specified orders set out within Regulations 3 and 5 and paragraphs 1 and 3 of the Schedule to The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 ('The Regulations').

7. The second category is under paragraphs 2 and 8 of Schedule 3 to the Act, where a person will be included in the lists if they meet the prescribed criteria. The person who is proposed to be barred has a right to make representations to the DBS ('autobar with representations'). There are prescribed criteria where a person has been convicted of certain specified criminal offences or made subject to specified orders but nonetheless is entitled to make representations as to inclusion on the list. The prescribed criteria are set out within Regulations 4 and 6 and paragraphs 2 and 4 of the Schedule to The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009.

8. If a person falls within the prescribed criteria under the Regulations, they satisfy subparagraph (1) of the following paragraphs and therefore under paragraphs 2(6), (2)(8), 8(6) or 8(8) of Schedule 3 to the Act, the DBS will include the person in the children's or adults' barred list if it:

a) is satisfied that this paragraph applies to the person,

b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to [children or adults], and [so long as the person has made representations regarding their inclusion]

c) is satisfied that it is appropriate to include the person in the children's barred list, it must include the person in the list.

9. In contrast, this appeal concerns the third category ('discretionary barring') where a person does not meet the prescribed criteria (has not been convicted of specified criminal offences nor made subject to specified orders as set out within

the Regulations and the Schedule thereto), and therefore paragraphs 3 and 9 of Schedule 3 to the Act apply.

10. It is the third category under which the DBS made the decision to bar the Appellant.

11. Under paragraphs 3(3) and 9(3) of Schedule 3 the DBS must include the person in the children's and adults' barred list if:

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

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

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

12. 'Relevant conduct' is defined under paragraphs 4 and 10 of Schedule 3 to the Act as set out above.

13. The difference between the sets of criteria in the second and third categories is where a person meets the prescribed criteria for automatic inclusion with representations (has been convicted of a specified offence or made subject of a specified order), the DBS is not required to decide if the person has been engaged in relevant conduct. This is because the statutory scheme appears designed so that a specified criminal conviction which satisfies the prescribed criteria, renders the need to make any findings about a person's conduct otiose.

The Right of Appeal and jurisdiction of the Upper Tribunal

14. Appeal rights against decisions made by the Respondent (DBS) are governed by section 4 of the Act. Section 4(1) provides for a right of appeal to the Upper Tribunal against a decision to include a person in a barred list or not to remove them from the list. Section 4 states:

'4(1) An individual who is included in a barred list may appeal to the [Upper] Tribunal against—

(a) . . .

(b) a decision under paragraph [2,] 3, 5, [8,] 9 or 11 of [Schedule 3] to include him in the list;

(c) a decision under paragraph 17[, 18 or 18A] of that Schedule not to remove him from the list.

(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake —

(a) on any point of law;

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

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

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

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

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

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

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

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

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

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

[Emphasis added]

15. Thus section 4(2) of the Act provides that a person included in (or not removed from) either barred list may appeal to the Upper Tribunal on the grounds that the DBS has made a mistake of law (including the making of an irrational or disproportionate decision) or a mistake of fact on which the decision was based. Although not provided for by statute, the common law requires that any mistake of fact or law, normally referred to as 'errors', must be material to the ultimate decision ie. that they may have changed the outcome of the decision – see [102]-[103] of the judgment in *R v (Royal College of Nursing and Others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin) ('*RCN')*:

'102.During oral submissions there was some debate about the meaning to be attributed to the phrase "a mistake ….in any finding of fact within section 4(2)(b) of the Act". I can see no reason why the sub-section should be interpreted restrictively. In my judgment the Upper Tribunal has jurisdiction to investigate any arguable alleged wrong finding of fact provided the finding is material to the ultimate decision.

> 103.In light of the fact that the Upper Tribunal can put right any errors of law and any material errors of fact and, further, can do so at an oral hearing if that is necessary for the fair and just disposition of the appeal I have reached the conclusion that the absence of a right to an oral hearing before the Interested Party and the absence of a full merits based appeal to the Upper Tribunal does not infringe Article 6 EHCR. To repeat, an oral hearing before the Interested Party is permissible under the statutory scheme and there is no reason to suppose that in an appropriate case the Interested Party would not hold such a hearing as Ms Hunter asserts would be the case. I do not accept that this possibility is illusory as suggested on behalf of the Claimants. Indeed, a failure or refusal to conduct an oral hearing in circumstances which would allow of an argument that the failure or refusal was unreasonable or irrational would itself raise the prospect of an appeal to the Upper Tribunal on a point of law. Further, any other error of law and relevant errors of fact made by the Interested Party can be put right on an appeal which, itself, may be conducted by way of oral hearing in an appropriate case.'

16. It flows from this that an appeal to the Upper Tribunal can only succeed if the DBS made a mistake in fact in making a finding upon which the decision is based or made a mistake in law in any way in making its decision – see section 4(5) of the Act.

Mistake or error of fact

17. Some mistakes of fact will amount to errors of law, for example, if it is demonstrated that the DBS took into account evidence that was irrelevant, or failed to take into account evidence that was relevant or made a finding that was unreasonable – no reasonable tribunal could have arrived at upon the evidence before it. These are all errors of law that might be committed in relation to a factual finding.

18. However, by virtue of section 4(2), mistakes of fact which are not also errors of law may also constitute a ground upon which the Upper Tribunal may interfere with a DBS finding upon which a decision is based. This type of mistake of fact might arise if the DBS recorded or interpreted evidence before it inaccurately or incorrectly or relied upon evidence which was inaccurate or incorrect as a matter of fact.

19. So long as the DBS takes account of the relevant evidence, provides rational reasons and makes no errors in the facts relied upon for rejecting a barred person's account on the balance of probabilities, this is unlikely to give rise to an arguable mistake of fact. In other words, an appeal before the Upper Tribunal is not a full merits appeal on the facts – see [104] of the *RCN* judgment below.

20. The Upper Tribunal must begin by examining the DBS decision and deciding whether it made any mistakes when finding the facts (such findings will have been made based on the documentary material available to it). However, the Upper Tribunal may also make its own fresh findings of fact having heard all potentially relevant evidence and witnesses during the appeal process by which

it may determine whether the DBS made a mistake of fact which was material to the making of its decision.

21. The extent of the jurisdiction for the Upper Tribunal to determine mistakes of fact by the DBS and make its own findings of fact was outlined in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC) at [51]:

'Drawing the various strands together, we conclude as follows:

a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).
b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.
c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.
d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).
e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.
f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.
g) The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.'

22. The more recent judgment of the Court of Appeal in *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575 ('AB'), addressed the Tribunal's fact-finding jurisdiction when remitting cases to the DBS having allowed an appeal:

'55. The Upper Tribunal also made findings of fact and made comments on other matters. Section 4(7) of the Act provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made (on which DBS must base its new decision)". It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind.

First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former

but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually-supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact.

Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, Upper Tribunal would have to have sufficient evidence to find a fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.'

Appropriateness

23. On an appeal, the Upper Tribunal ('UT') must confirm the DBS's decision unless it finds a material mistake of law or fact. If the UT finds such a mistake, it must remit the matter to the DBS for a new decision or direct the DBS to remove the person from the list.

24. Under section 4(3) of the Act, the decision whether or not it is "appropriate" for an individual to be included in a barred list is "not a question of law or fact". Section 4(3) of the Act therefore provides that the appropriateness of a person's inclusion on either barred list is not within the Upper Tribunal's jurisdiction on an appeal. Unless the DBS has made a material error of law or fact the Upper Tribunal may not interfere with the decision - *RCN* at [104]:

'104.I am more troubled by the absence of a full merits based appeal but I am persuaded that its absence does not render the scheme as a whole in breach of Article 6 for the following reasons.

First, the Interested Party is a body which is independent of the executive agencies which will have referred individuals for inclusion/possible inclusion upon the barred lists. It is an expert body consisting of a board of individuals appointed under regulations governing public appointments and a team of highly-trained case workers. Paragraph 1(2)(b) of Schedule 1 to the 2006 Act specifies that the chairman and members "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults."

The Interested Party is in the best position to make a reasoned judgment as to when it is appropriate to include an individual's name on a barred list or remove an individual from the barred list. In the absence of an error of law or fact it is difficult to envisage a situation in which an appeal against the judgment of the Interested Party would have any realistic prospect of success.

Second, if the Interested Party reached a decision that it was appropriate for an individual to be included in a barred list or appropriate to refuse to remove an individual from a barred list yet that conclusion was unreasonable or irrational that would constitute an error of law. I do not read section 4(3) of the Act as precluding a challenge to the ultimate decision on grounds that a decision to include an individual upon a barred list or to refuse to remove him from a list was unreasonable or irrational or, as Mr. Grodzinski

submits, disproportionate. In my judgment all that section 4(3) precludes is an appeal against the ultimate decision when that decision is not flawed by any error of law or fact.'

25. The fact that the appropriateness of barring is not to be examined as an error of fact in the light of section 4(3) of the Act was recently reiterated in *DBS v AB [2021] EWCA Civ 1575*. The Court of Appeal explained the nature of the Upper Tribunal's jurisdiction at [67]-[68]:

'67. The context, and the nature of the statutory scheme, is that it creates a system for the protection of children and vulnerable adults. It provides for an independent body, the DBS, to determine whether specified criteria are met and, in the case of paragraph 3 of Schedule 3 to the Act, that it is appropriate to include a person's name in the children's barred list or the adults' barred list. There is a safeguard for individuals in that they may appeal to the Upper Tribunal on the basis that the DBS has made an error of law or fact. The Upper Tribunal cannot consider the appropriateness of the decision to include or retain the person's name in a barred list when deciding if the DBS had made such an error. If the DBS has not made an error of law or fact, the Upper Tribunal must confirm the decision of the DBS (section 4(5) of the Act). Only if the DBS has made an error of law or fact, can the Upper Tribunal determine whether to remit or direct removal of the person's name from the list (section 4(6) of the Act).

68.The scheme as a whole appears, therefore, to contemplate that the DBS is the body charged with decisions on the appropriateness of inclusion of a person within a barred list. The power in section 4(6) of the Act needs to be read in that context. The context would not readily indicate that the Upper Tribunal is intended to be free to decide for itself questions concerning the appropriateness of inclusion of a person in a barred list. It is unlikely, therefore, that section 4(6) of the Act was intended to give the Upper Tribunal the power to direct removal because it, the Upper Tribunal, thinks inclusion on the list is no longer appropriate. It is more consistent with the statutory scheme that the power is to be exercised when the only decision that the DBS could lawfully make would be to remove the person from the barred list.'

26. Therefore, the DBS is empowered and required to make a judgement as the expert body appointed by Parliament, whether the relevant conduct is such that, in all the circumstances, makes it "appropriate" to include the individual in the CBL. In so doing it will normally take into account a risk assessment, that it performs in relation to the individual it proposes to bar. However, the DBS concedes that the rationality and proportionality of any risk assessment it conducts can be challenged as having been made in error of law.

Mistake or error of law

27. A mistake or error of law includes instances where the DBS have got the particular legal test or tests wrong (applied or interpreted the law incorrectly), or failed to consider all the relevant evidence or made a perverse, unreasonable or irrational finding of fact, or failed to explain the decision properly by giving sufficient or accurate reasons, or breached the rules of natural justice by failing to provide a fair procedure or hearing (in the rare circumstances where it considers oral representations).

28. A mistake of law will also include instances where the decision to bar was disproportionate.

Proportionality

29. The UT is not permitted to carry out a full merits reconsideration of, or to revisit, the appropriateness of R's decision to bar; but it does have jurisdiction to determine proportionality and rationality in relation to the DBS's judgment as to the risk that a barred person poses and whether they should be included on the list, according appropriate weight (in so doing) to the DBS's decision as the body particularly equipped, and expressly enabled by statute, to make safeguarding decisions of this specific kind (e.g. B v Independent Safeguarding Authority (CA) [2012] EWCA Civ 977, [2013] 1 WLR 308 ; *Independent Safeguarding Authority v SB (Royal College of Nurses intervening)* [2012] EWCA Civ 977; [2013] 1WLR 308 ('B').

30. Maintenance of public confidence, in the regulatory scheme and the barred lists, will "always" be a material factor when seeking to balance the rights of the individual and the interests of the community (e.g. B). Where it is alleged that the decision to include a person in a barred list is disproportionate to the relevant conduct or risk of harm relied on by the DBS, the Tribunal must, in determining that issue, give proper weight to the view of the DBS as it is enabled by statute to decide appropriateness - see the Court of Appeal's judgment in B at paragraphs [16]-[22] (ISA formerly assuming the role of the DBS):

'16. The ISA is an independent statutory body charged with the primary decision making tasks as to whether an individual should be listed or not. Listing is plainly a matter which may engage Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Article 8 provides a qualified right which will require, among other things, consideration of whether listing is "necessary in a democratic society" or, in other words, proportionate. In *R (Quila) v Secretary of State for the Home Department* [2011] 3 WLR 836, Lord Wilson summarised the approach to proportionality in such a context which had been expounded by Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 (at paragraph 19). Lord Wilson said (at paragraph 45) that:

> "… in such a context four questions generally arise, namely: (a) is the legislative object sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?"

There, as here, the main focus is on questions (c) and (d). In *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 Lord Bingham explained the difference between such a proportionality exercise and traditional judicial review in the following passage (at paragraph 30):

> "There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test … The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time … Proportionality must be judged objectively by the court …"

17. All that is now well established. The next question – and the one upon which Ms Lieven focuses – is how the court, or in this case the UT, should approach the decision of the

primary decision-maker, in this case the ISA. Whilst it is apparent from authorities such as *Huang* and *Quila* that it is wrong to approach the decision in question with "deference", the requisite approach requires

> "… the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

Per Lord Bingham in *Huang* (at paragraph 16) and, to like effect, Lord Wilson in *Quila* (at paragraph 46). There is, in my judgment, no tension between those passages and the approach seen in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 which was concerned with a challenge to the decision of the City Council to refuse a licensing application for a sex shop on the grounds that the decision was a disproportionate interference with the claimant's Convention rights. Lord Hoffmann said (at paragraph 16):

> "If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights."

Lady Hale added (at paragraph 37):

> "Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, the court would find it hard to upset the balance which the local authority had struck."

These passages are illustrative of the need to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation.

…….

22. This brings me to two particular points. First, there is the fact that, unlike the ISA, the UT saw and heard SB giving evidence. However, it cannot be suggested that it was unlawful for the ISA not to do so. It had had at its disposal a wealth of material, not least the material upon which the criminal conviction had been founded and which had informed the sentencing process. The objective facts were not in dispute. Secondly, Mr Ian Wise QC, on behalf of the Royal College of Nursing, emphasises the fact that the UT is not a non-specialist court reviewing the decision of a specialist decision-maker, which would necessitate the according of considerable weight to the original decision. It is itself a specialist tribunal. Whilst there is truth in this submission, it has its limitations for the following reasons: (1) unlike its predecessor, the Care Standards Tribunal, it is statutorily disabled from revisiting the appropriateness of an individual being included in a Barred List, *simpliciter*; and (2) whereas the UT judge is flanked by non-legal members who themselves come from a variety of relevant professions, they are or may be less specialised than the ISA decision-makers who, by paragraph 1(2) of schedule 1 to the 2006 Act "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults". I intend no disrespect to the judicial or non-legal members of the UT in the present or any other case when I say that, by necessary statutory qualification, the ISA is particularly equipped to make safeguarding decisions of this kind, whereas the UT is designed not to consider the appropriateness of listing but more to adjudicate upon "mistakes" on points of law or findings of fact (section 4(3)).'

31. In summary, questions of the proportionality of DBS's decisions to include individuals on the barred lists should be examined applying the tests laid down

by Lord Wilson in *R (Aguilar Quila) v Secretary of Stage for the Home Department* [2012] 1 AC 621 at para 45:

> …But was it "necessary in a democratic society"? It is within this question that an assessment of the amendment's proportionality must be undertaken. In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, Lord Bingham suggested, at para 19, that in such a context four questions generally arise, namely:
>
> a) is the legislative objective sufficiently important to justify limiting a fundamental right?
>
> b) are the measures which have been designed to meet it rationally connected to it?
>
> c) are they no more than are necessary to accomplish it?
>
> d) do they strike a fair balance between the rights of the individual and the interests of the community?

32. In assessing proportionality, the Upper Tribunal has '*…to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation*' (see *Independent Safeguarding Authority v SB* [2012] EWCA Civ 977 at [17] as set out above).

Burden and Standard of proof

33. The burden of proof is upon the DBS to establish the facts when making its findings of relevant conduct in its barring decision. Thereafter on the appeal to the UT, the burden is on the Appellant to establish a mistake of fact. The standard of proof to which the DBS and the Upper Tribunal must make findings of fact is on the balance of probabilities, ie. what is more likely than not. This is a lower threshold than the standard of proof in criminal proceedings (being satisfied so that one is sure or beyond reasonable doubt).