Neutral Citation Number: [2023] EWCA Civ 982

Case No: CA-2022-001458

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge Jacobs
UA-2021-002014-V

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 August 2023

Before:

LORD JUSTICE LEWISON
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

Between:

DISCLOSURE AND BARRING SERVICE	**Appellant**
- and -	
JHB	**Respondent**

- -
- -

Carine Patry KC and Yaaser Vanderman (instructed by **Disclosure and Barring Service Legal Services**) for the **Appellant**
JHB appeared in person

Hearing date: 16 May 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 17 August 2023 by circulation to the parties or their representatives by e-mail and by later release to the National Archives on 23 August 2023.

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Lady Justice Elisabeth Laing:

Introduction

1. The Respondent, JHB, was convicted of a sexual offence against a child who was 13 at the time. As a result, his name was included in what came to be known as 'the children's barred list'. He applied to the Appellant, the Disclosure and Barring Service ('the DBS') for a review of his inclusion on that list. The DBS, in a decision dated 22 January 2021 ('the Decision') decided not to remove him from that list and to add his name to 'the adults' barred list'. JHB then appealed to the Upper Tribunal (Administrative Appeals Chamber) ('the UT'). In a decision authorised for issue on 23 February 2022 ('the Judgment'), the UT decided that the DBS had 'made mistakes of law and fact on which its decision was based'. The UT also 'ma[de] findings of fact and remit[ted] the matter to the DBS for a new decision'. The issue on this appeal, for which Singh LJ gave permission, is whether, in doing so, the UT acted beyond its powers.

2. On this appeal, the DBS was represented by Ms Patry KC and Mr Vanderman. JHB represented himself. I thank the parties for their written and oral arguments. Paragraph references are to the judgment of the UT, or, if I am referring to an authority, to that authority.

3. For the reasons given in this judgment, I have concluded that the UT acted unlawfully. It misunderstood its powers on an appeal against a decision of the DBS, and contrary to both a decision of this Court, and to a decision of a Presidential panel of the UT, purported to make findings of fact when it had no power to do so. I would allow the DBS's appeal. In order to put the legal issue in its context, I will summarise the facts, the Decision, the legal framework and the Judgment. I will then explain why I have reached my conclusion.

The background to the Decision

4. I have taken this summary of the background from the Decision and from a document which the UT referred to as 'the Decision Records'. I say more about the Decision Records in paragraph 29, below.

5. On 15 June 2007, JHB was convicted of sexual activity (by penetration) with a female child under the age of 16 ('the Offence'). He had pleaded guilty. He was 20 at the time and the child ('victim 1') was 13. Victim 1 was the daughter of JHB's father's then partner. JHB sometimes stayed the night in their house, and was allowed to sleep in victim 1's bedroom, as he was seen as being like a brother to her. In her police interview, victim 1 said that, at some point after the Offence, JHB had said to her 'You'd better not tell anyone 'cos I could get arrested.'

6. On 13 August 2007 he was sentenced to 30 months' imprisonment, and was disqualified from working with children. He was required to register under the Sexual Offences Act 2003 for ten years. A sexual offences prevention order ('SOPO') was made until further order. Victim 1 later gave birth to a child, who, a DNA test showed, was his child. The DBS concluded that JHB had continued to deny that the child was his until his paternity was proved by that test, and that even then, did not admit this immediately.

7. On 28 November 2018 JHB applied to the DBS for a review of his inclusion in the list, pursuant to paragraph 18 of Schedule 3 to the Safeguarding of Vulnerable Groups Act 2006 ('the SVGA'). JHB's representations included an NHS psychological and forensic risk assessment from 2016 and an earlier report from 2013 dealing with his completion of his treatment regime as a sex offender ('the reports'). The DBS concluded that material in the reports showed that JHB had been 'intentionally dishonest' with the police about the Offence when he was questioned by them. Material in the reports also supported a further allegation about JHB's sexual conduct in relation to victim 1, which I refer to in paragraph 9.i., below. The DBS's researches also indicated that JHB had been the subject of other allegations, which were similar to the conduct which was the subject of JHB's conviction. Finally, checks by the DBS showed that the requirement that JHB register with the police was indefinite.

The Decision

8. The Decision described the procedural background, and said that the DBS had considered all the information, including JHB's representations. The DBS had decided that it was 'appropriate and proportionate' to keep JHB's name on the children's barred list, and to include his name on the adults' barred list. The DBS had taken into account the conviction (see paragraph 5, above).

9. The DBS considered that three further allegations were 'proven on the balance of probabilities'. I will refer to these allegations collectively as 'the further conduct'.
    i. On several unspecified dates in January and February 2006, JHB engaged in sexual activity with victim 1, who was 13 at the time. That activity included touching and penetrating her vagina with his fingers. At the UT hearing, JHB accepted that this finding was correct (paragraph 8 of the Judgment). Victim 1 was the same person as the subject of JHB's conviction (see paragraph 5, above) (also paragraph 8 of the Judgment). I will refer to this as 'finding 1'.
    ii. On the night of 28 May 2010, he had non-consensual intercourse with his girlfriend, who was 16 ('victim 2'). I will refer to this as 'finding 2'.
    iii. On 20 May 2010, he bought alcohol for two women who were 18 and 19 ('victim 3' and 'victim 4'), later got into bed with them while they were asleep (and not aware of him) and touched victim 3. I will refer to this as 'finding 3'.

10. The DBS was satisfied that JHB had 'engaged in relevant conduct in relation to children'. That conduct was inappropriate sexual conduct involving a child, and conduct which, if repeated against or in relation to a child, would endanger that child, or would be likely to endanger him or her. The DBS was also satisfied that JHB had engaged in relevant conduct in relation to vulnerable adults. That conduct was conduct which, if repeated against or in relation to a vulnerable adult, would endanger that vulnerable adult, or would be likely to endanger him or her. The DBS considered that JHB had taken advantage of his victims 'by exploiting their vulnerability and manipulating them'.

11. He had exploited his position as a trusted family friend of victim 1 to have sexual activity with her. He had been considered 'to be like a brother to her'. She was vulnerable due to her age and not able to consent, yet JHB had 'pressured her into having sexual intercourse with' him. The DBS was now satisfied that he had also engaged in the conduct described in paragraph 9.i., above. The DBS was also satisfied that he had manipulated victim 1 into not disclosing this by telling her that he would not visit any more if she told anyone, and that, if she did, she could get him arrested. His conduct towards victim 1 was 'likely to have caused her significant sexual harm and significant, lasting emotional harm'.

12. The DBS was also satisfied in relation to finding 2 (see paragraph 9.ii., above). JHB had been alone with victim 2 and she was 'very heavily intoxicated', and therefore could not validly consent. That was further evidence of his 'exploitative behaviour'. It was likely to have caused victim 2 'significant sexual and emotional harm'.

13. The DBS was satisfied in relation to finding 3 (see paragraph 9.iii., above). The DBS acknowledged that victim 3 did not want to make a complaint to the police about this, but its view was that 'this behaviour is considered likely to cause emotional harm if it were to be repeated against a vulnerable person within regulated activity'.

14. JHB had shown a 'significant lack of empathy for' his victims. He had committed serious sexual offences against a child even though she had asked him not to. He had little regard for the impact on victim 1, who had been 13. He had made her feel as if it was her fault, and that she could not tell anyone. She did not tell anyone she was pregnant until she was 26 weeks' pregnant. That showed the impact which his behaviour was likely to have had on a 13-year-old. He continued to deny his behaviour even when he knew that she was pregnant and despite the bad effect which that was likely to have had on her.

15. JHB's probation officer noted that JHB did not seem to be remorseful, and that his expressions of regret were not genuine. JHB had a poor attitude in his interview. He had tried to make jokes despite the fact that he was being interviewed about a sexual offence. The DBS took into account that this happened a long time ago and that JHB claimed to have 'addressed empathy towards' his 'victims as part of [his] treatment.' This only showed a 'fundamental lack of understanding of the severity of [his] actions'. JHB had not said, in any of his correspondence with the DBS, anything about his victim or about the effect of his behaviour on her. All he had said was to acknowledge that he 'did wrong 15 years ago'.

16. Shortly after his release from prison after serving the sentence for the Offence, he had non-consensual sex with victim 2, which showed a 'considerable lack of empathy' for her. The next day, when victim 2 had asked what had happened the night before, because she could not remember, he had made 'obscene and joking comments to her in front of other witnesses' about what had happened. This 'further demonstrated' his continuing lack of empathy for his victims, and for the effect of his behaviour on them, even though he had only recently been released from prison for similar behaviour.

17. About a week earlier, after a night of drinking, he had got into bed with victims 2 and 3. He had only just been released from prison, was subject to a SOPO and had been

included in the sex offenders' register. He would have been aware of the severe consequences of a further conviction for a sexual offence, yet still behaved recklessly.

18. The DBS referred to an NHS risk assessment which JHB had provided to it with his initial representations. It said that JHB knew that he was 'walking a very thin line' after his release in his relationship with a 16-year-old girl, but had continued with the relationship. The NHS assessments were positive about him and about his engagement with his treatment. They stated that he presented a low risk. They added that JHB understood why he had behaved recklessly and inconsiderately. They were positive about his work on victim empathy and remorse.

19. The DBS gave 'very limited weight' to the assessments because JHB had not been honest with the psychologists who wrote them. JHB had said, during the assessments, that he had not known how old victim 1 was at the time of the Offence, despite having admitted in a police interview that he had known her age. He had, further, warned her at some point not to tell anyone as she could get him arrested, which also suggested that he had known her age. JHB had also told the psychologist that he had admitted the Offence when confronted with the DNA evidence. That was not true, as JHB had then told the police that he was drunk and could not remember. Nor did the psychologists have 'full knowledge' of the further conduct (described in paragraph 9, above), which the DBS was 'now satisfied' was 'proven on the balance of probabilities'.

20. The DBS acknowledged that JHB did not accept that he had lied, or that the psychologist had not known about the further conduct. The DBS did not accept that 'given the available evidence'. The DBS added, 'importantly' that the context of the risk assessments was JHB's access to his daughter. They did not assess the risk which JHB might pose if he were to work in regulated activity with vulnerable groups.

21. The DBS accepted that JHB had succeeded in getting the SOPO removed. The DBS did not know the reasons for that decision. It was reasonable to assume that a premise for that decision had been that JHB's name would continue to be on the children's barred list. The decision would also have been taken in ignorance of the further conduct. As with the assessments, limited weight could be given to this factor in considering the risk which JHB posed. Further, JHB was still on the sex offenders' register. While JHB had said in his representations, without any supporting evidence, that the police had told him that he could come off it next year, the information which the DBS had suggested that his inclusion on it was indefinite.

22. The DBS had no information about JHB's character, apart from the assessments and limited information from social services that, in 2017, JHB was married with one child. Despite prompting in the 'Minded to Bar' letter, JHB had not, in his final representations, provided any more information in support of his character. The DBS acknowledged that it did not know about any 'further proven incidents of concern'. But the passage of time since May 2010 did not negate the significance of his past behaviour, or of 'the resultant concerns'. The representations had little impact on 'significant concerns' about his 'considerably harmful behaviour' and the risk he might present if he were to work in regulated activity with children and vulnerable adults in the future.

23. JHB's harmful behaviour, as evidenced by the Offence and by the further conduct, was relevant to work in a regulated activity with children and with vulnerable adults. The DBS explained why. In particular, the DBS explained that it did not consider that JHB had a sexual preference for children. His conduct against children, including the victims of his most harmful behaviour, victim 1 and victim 2, showed that he exploited their vulnerabilities in order to engage in sexual activity with them. For that reason, the Offence and the further conduct against children were also relevant to regulated activity with vulnerable adults. Victims 1 and 2 were not victims because they were children, but because JHB was 'able to manipulate and exploit them, as well as the power imbalance and situation, for [his] own benefit'. It was not unreasonable to believe that JHB might exploit the vulnerabilities of adults for his own sexual gratification.

24. Adults are vulnerable for a range of reasons. Many young vulnerable adults are as vulnerable as, or more vulnerable than, teenagers, in particular, those with learning difficulties, developmental delays or mental health issues. It was that group of vulnerable adults who were susceptible to, and would be most at risk from, 'the type of abuse [JHB] previously displayed'. It was reasonable to conclude that if JHB were to work with vulnerable adults in the future, it would 'present opportunities to exploit and/or manipulate them'. If he did, that was 'likely to cause them significant sexual and emotional harm'. It was therefore appropriate to include JHB's name in the adults' barred list.

25. The confidence which a reasonable member of the public who knew the full facts might have in the effectiveness of the DBS as a safeguarding organisation would be undermined by a decision not to continue JHB's inclusion in the children's list, or not to include him in the adults' list.

26. The DBS then explained why it considered that it was proportionate to take those steps. JHB had said in his representations that he did not want to work with children, but that he might come across them in his work as a security officer. He had not said that he wanted, either, to work with vulnerable adults. As he had previously worked in regulated activity, the DBS considered it possible that he might wish to do so in the future. The DBS had no power to define which age groups a person should be barred from working with. It acknowledged that a bar from all regulated activity with children and vulnerable adults could have a significant impact on JHB's future ability to get employment. For the reasons given in the Decision, and in the light of the fact that the DBS did not have power to impose any lesser sanction, the risk of harm which JHB presented outweighed the harm to him.

27. The record of JHB's conviction for the Offence would appear in any enhanced disclosure and would provide a limited safeguard. It could not be relied on as a sufficient safeguard from harm, however, as it would not provide a prospective employer with information about the further conduct.

28. The Decision also notified JHB of his right of appeal.

29. We were also provided with a 50-page document setting out the DBS's detailed reasoning. We were told that if a person appeals to the UT, a document in this form is provided to the appellant and to the UT. The first few pages consist of summary of the

evidence which the DBS considered in relation to the conviction and every other allegation, JHB's representations about them, and an explanation of the way in which the DBS had evaluated that material. The document also contains a structured and detailed analysis of risk factors, analyses of appropriateness and proportionality, and of JHB's representations. The UT referred to this document in the Judgment as 'the Barring Decision Process Records' ('the Decision Records'). In paragraph 30 of *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC), the UT explained that at the point when a person appeals to the UT, he will not have seen the evidence on which the DBS relied, or its detailed reasons. It also explained that its practice, when the UT considers an application for permission to appeal, is to direct the DBS to produce the relevant documents (in other words, the Decision Records).

The legal framework

30. The Independent Safeguarding Authority ('the ISA') was established by the SVGA. Section 87(1) of the Protection of Freedoms Act 2012 ('the 2012 Act') established the DBS. Section 88 of the 2012 Act gave the Secretary of State a power by order to transfer the functions of the ISA to the DBS. Section 88(3) gave the Secretary of State power by order to dissolve the ISA. The Secretary of State exercised those powers by making the Protection of Freedoms Act 2012 (Disclosure and Barring Service Transfer of Functions) Order 2012 (2012 SI No 3006), which transferred the functions of the ISA to the DBS and dissolved the ISA.

31. Section 2(1) of the SVGA requires the DBS to keep a children's barred list and an adults' barred list. Section 2(2) and (3) enact Parts 1 and 2 of Schedule 3 to the SVGA 'for the purposes of determining', respectively, whether a person 'is included' in those lists. Section 3 defines a person who is barred from regulated activity. Part 3 of Schedule 3 makes further provision about the lists. Section 5 defines 'regulated activity' by reference to the provisions of Parts 1 and 2 of Schedule 4 to the SVGA.

32. Schedule 3 provides a detailed procedure which the DBS must follow before putting a person on either list. Paragraphs 3(3) and 9(3) require the DBS to include a person's name in each list if the DBS 'is satisfied that the person has engaged in relevant conduct…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, as the case may be] and …it is satisfied that it is appropriate to include the person in the list'. 'Relevant conduct' is defined in paragraphs 3 and 9 of Schedule 3. Paragraph 13(1) requires the DBS to 'ensure in respect of any information it receives in relation to an individual from whatever source or of whatever nature it considers whether the information is relevant to its consideration as to whether the individual should be included in each barred list'. That provision does not, 'without more, require DBS to give an individual the opportunity to make representations as to why he should be included in a barred list' (paragraph 13(2)). A person who has been put on a list may apply to the DBS for a review of that decision (paragraph 18 of Schedule 3, subject to the provisions of paragraph 18).

33. Section 4(1) is headed 'Appeals'. It gives a person who is included in a barred list a right to appeal to the UT against various decisions to include, and not to remove him from, a list, including a decision made under paragraph 18 of Schedule 3. Section 4(2)-(7) provides:

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

(a) on any point of law

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

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

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

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

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

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

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

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

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

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

34. The Protection of Children Act 1999 ('the 1999 Act') was repealed and replaced by the SVGA. Section 4 of the 1999 Act was headed 'Appeal against inclusion in list'. Section 4(1) conferred a right of appeal against the two decisions it listed. Section 4(3) provided

(3) If on an appeal…the Tribunal is not satisfied of either of the following, namely –

(a) that the individual was guilty of the misconduct (whether or not in the course of his duties) which harmed a child or placed a child at risk of harm; and

(b) that the individual is unsuitable to work with children,

the Tribunal shall allow the appeal …and…director his removal from the list; otherwise it shall dismiss the appeal…'

Section 86 of the Care Standards Act 2000 ('the 2000 Act'), which was also repealed and replaced by the SVGA, was in similar terms, except that the phrase 'vulnerable adults' replaced 'children' in section 4(3)(b).

The Judgment

35. Both the parties attended the hearing. For reasons which are not clear, there is no transcript of the hearing. In paragraph 2 of its decision refusing permission to appeal (see further paragraphs 75-80, below) the UT said that it had been told that no copy of the relevant recording could be found. It seems that JHB gave evidence at the hearing (see, for example, paragraph 20 of the Judgment, to which I refer in paragraph 45, below). There is, however, no narrative of his evidence in the Judgment, so it is not clear, either, how much evidence he gave, or what topics it covered. I have therefore inferred, from the limited references to his evidence in the Judgment, that JHB did not give very much evidence, and that his evidence only covered the points to which the UT referred expressly in the Judgment. A further difficulty is that in some parts of the Judgment, the UT did not clearly distinguish between the evidence which they had heard, and the material in contemporaneous witness statements (see, for example, paragraph 16, to which I refer in paragraph 42, below).

36. The UT summarised section 4 of the SVGA in paragraph 4. JHB's case was that he disagreed with two of the DBS's findings of fact. He also complained that the DBS had not given him enough credit for evidence which showed that he was no longer a risk to children. He was concerned that when his licence as a security guard was renewed, being on a barred list would be harmful (paragraph 5).

37. In paragraph 6, the UT listed the DBS's three findings about the further conduct (see paragraph 9, above). It recorded that JHB accepted that finding 1 (see paragraph 9.i., above) was correct.

38. The UT then considered finding 2 (see paragraph 9.ii., above), in paragraphs 9-19. The UT said that the DBS 'made a mistake with this finding'. The UT found, instead, that while JHB did have intercourse with victim 2, 'the evidence does not allow a finding that it was non-consensual' (paragraph 9).

39. In paragraph 10, the UT commented that there were five witness statements and that, because of the redaction of the witnesses' names, it was difficult to work out what had happened: 'a confused picture emerges'. It was clear that everyone had had a lot to drink. 'At worst' victim 2 was described as 'having to be more or less carried home'. When JHB and victim 2 had got back to the flat, at nearly midnight, they had had sex. The question was whether that was consensual.

40. The UT then summarised their accounts 'in some detail', JHB's in paragraph 11, and victim 2's in paragraph 12. It is clear from the UT's summary of his evidence that JHB well knew that victim 2 was very drunk throughout. The UT said that victim 2 could not remember intercourse. 'She cannot say, and we cannot find as a fact, whether she was unaware of what was happening at the time or only unable to recall it later. Either way, she is unable to say what happened when intercourse took place'. Her picture of the evening was similar to JHB's, except that she described herself as being more drunk than he did. She had been having her period at the time and would not feel comfortable having sex. 'This time she had felt uncomfortable as she had been too drunk to consent to what happened'.

41. On 5 October 2010, she made a statement to the police, saying that JHB had not raped her. She had not been forced to make the statement, she said, and was now back in a relationship with JHB. The reason the police decided to take no further action was that, in the light of that retraction, the CPS had decided that a jury 'would not conclude, looking at all the circumstances, that …(JHB) did not believe that he had consent'. The case was 'finalised as No Crime' in view of the retraction and the advice of the CPS. The UT mentioned that the relationship was to last another seven years, and they had a daughter together.

42. Paragraph 16 starts with the sentence 'These are our findings'. The UT accepted parts of JHB's account: 'JHB accepts that vaginal intercourse took place, but says that it only happened once'. This appears to refer to what JHB's evidence at the hearing. The UT continued, 'He said "I shagged you five times", but we do not believe it, any more than victim 2 did…This sounds like an example of a young man's inappropriate sense of humour. He also said, "I did you up the arse", but the medical evidence was that "non-consensual anal activity had not taken place". We accept the doctor's opinion'. Those quotations appear to be from the contemporaneous witness statements. The UT said how drunk victim 2 had been when she and JHB had sex had to be 'decided on the balance of probabilities…It is true that during the evening she was often not in a state to consent…Despite this, the difficulty we have is being sufficiently confident that at the moment when sex took place, she was not able to consent. We have taken account of victim 2's retraction, despite the points made by DBS…It is significant that she told the police that JHB did not rape her… That is our assessment of the evidence.'

43. Paragraph 18 starts by saying that, 'There is a further problem with the way DBS assessed the evidence of this incident. We mention this as supporting our decision that DBS was mistaken in making this finding'. The UT then quoted a passage from the Decision Records. In that passage, the DBS explained that it was necessary to be cautious about the retraction, and, although the statement gave no reason for the retraction, it did say that she was back in a relationship with JHB, and 'it would be reasonable to suggest that this may have influenced her decision to retract the allegation'.

44. The UT said that the passage showed that the DBS had assessed victim 2's credibility by reference to some of the evidence, and had then re-considered that assessment in the light of the retraction. 'That is not the correct way to assess evidence. It is wrong to make a provisional assessment on the basis of some evidence and then test it by reference to other evidence'. The UT then quoted paragraph 29 of the judgment in *Jakto Transport Limited v Hall* [2005] EWCA Civ 1327, which, in turn, quotes paragraph 24 of the judgment of Wilson J (as he then was) in *Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367. The UT acknowledged that the two cases concerned expert evidence. They were relevant, nevertheless, because the reasoning was based on the need to assess the evidence as a whole. It was wrong to assess the evidence in stages, 'with a provisional view formed that has to be displaced later, which is what DBS did here…a judgment can be skewed by the disproportionate effect of earlier assessment...the evidence still has to be assessed as a whole.'

45. The UT considered finding 3 (see paragraph 9.iii.), above, in paragraphs 20-25. In paragraph 20, it announced that the DBS 'made a mistake by making this finding and basing its decision on it. There are problems with this finding, which is too general *to allow any significance to be attached to it in terms of barring'* (my emphasis). In paragraph 21, the UT 'accept[ed]' JHB's evidence that the police did not interview him about this incident. The DBS had not been able to get any record of an interview, and 'There would be a record of an interview, if one had taken place…'. The UT reported that JHB had told it that he did not remember the incident. The UT did not comment on that statement.

46. According to police records, the incident had come to their attention as a third-hand report. The reporter had told the police that 'JHB had tried to take advantage of young girls by offering them alcohol. The 3rd party stated they were not sure how JHB took advantage or how far he got'. The police spoke to those involved: 'they were young women rather than girls'. Neither wanted to make a complaint. One refused to speak to the police except by phone, and said she did not want to discuss it. The other (victim 3) was 18. She had known JHB for six to eight months. 'He had bought alcohol and they had got drunk. They all went back to the women's accommodation. JHB got onto the sofa, while the women got into their bed. When they woke, he was in bed with them. He touched victim 3, but she refused to say where. She had spent time with him on the day before she was questioned'.

47. The police took no further action. They explained that they had spoken to both complainants and that because they had made no complaints, the police decided not to make any crime reports (paragraph 23). In paragraph 24, the UT said that 'It is not possible to make any findings in relation to this incident *in sufficient detail to be relevant to barring*' (my emphasis, again). The person who reported the incident only knew that JHB had bought alcohol. Given their ages, it was lawful for them to buy it and for him to buy it for them. There was no evidence about who 'initiated the purchase'. There was 'no evidence to suggest that he had deliberately plied them with alcohol to take sexual advantage, as the third party implied. The worst that the evidence showed was that he ended up in bed with them and touched one of them'. Neither made a report to the police and neither wanted to pursue it when it was reported. 'Whatever happened, victim 3 was prepared to remain in contact with JHB after the incident. The context does not allow any more precise findings to s[h]ow what significance is to be attached to whatever happened'.

48. The UT added, in paragraph 25, 'We regard it as particularly significant that the police did not even speak to JHB, despite his known record'.

49. Paragraphs 26-34 are headed, 'Credit for other risk assessments'. The UT said, in paragraph 26, that JHB was 'entitled to credit for' the assessments 'and for the courses which he has taken from the start of his time in prison'. In paragraph 28, the UT said that 'There are three factors that should have been treated as significant in favour of Mr Evans' reports'. Those were his qualifications and experience, the range and nature of the tests which he had done with his assistant, and that the way in which the assessment was done 'allowed Mr Evans to test the reliability of what JHB was saying'.

50. The UT then considered whether there was anything to undermine the reports. 'This is what the DBS did. It qualified its reliance on [the reports]'. The UT then 'examine[d]' each of the DBS's reasons. Those were that the report was written for a different purpose (access to JHB's own daughter in family proceedings) ('reason 1'); that the authors of the report did not know about the DBS's additional findings ('reason 2'); that JHB had maintained that he did not know how old victim 1 was at the date of the Offence ('reason 3'); and that contrary to what JHB told Mr Evans, the DBS had found that JHB did not immediately accept responsibility when told that a DNA test had shown that he was the father of victim 1's child ('reason 4').

51. The UT commented that it was 'wrong' to assess a report as a package to be 'accepted or rejected'. 'Rather, it should be assessed as a bundle from which it is possible to extract what is of value and to reject what is not' (reason 1). The UT said that the DBS was wrong about the findings. Finding 1 was no more than the circumstances of the Offence. The UT had, in its judgment, it said, 'dealt with' the other findings in detail (reason 2). Reason 3 was that the DBS had not distinguished between knowing a child's age and knowing that she was under 16. The UT was 'willing to accept, and find, that JHB did not know the girl's precise age'. JHB had said in oral evidence that he was told by the police that victim 1 was under age, and 'his answers could take account of that knowledge when wording his statements'. The UT found it 'difficult to accept that JHB did not know she was under 16'. The DBS had mis-read the report. It did not show that Mr Evans was misled by JHB. 'It is a reference to the way that JHB was able to bypass victim 1's age. This probably also explains the doctor's references to reckless behaviour'. I find it difficult to follow the UT's reasoning here, but what the UT seems to have thought is that JHB did not know victim 1's precise age when he committed the Offence. The UT conceded that reason 4 was correct, in that JHB did not accept responsibility as soon as the was told the result of the DNA test (in a police interview). But, said the UT, he had accepted responsibility by the time of his plea. There was no evidence of when he changed his position and 'to treat this short delay as a factor to undermine Mr Evans' assessment is unrealistic'. If his plea was the result of legal advice 'Willingness to listen to advice is not a criticism'.

52. In section E of the Judgment, the UT dealt with the effects of barring on JHB's work as a security guard.

53. Section F is headed 'Conclusion'. The UT had 'found errors in the facts found by DBS. We have made our own findings'. The UT had borne in mind the 'words of caution' in paragraph 55 of *AB*. 'We have the evidence on which to make them and it is appropriate to do so. On those findings we cannot say that JHB should not be included in the lists. That requires a fresh assessment of whether inclusion is appropriate. We have remitted the case to DBS for that to be done'. JHB should stay on the lists in the meantime.

The application for permission to appeal from the UT to this court

54. The DBS applied to the UT for permission to appeal on four grounds.

    i. The UT acted unfairly by making material findings on points which had not been canvassed in the grounds of appeal, the UT's grant of permission to appeal or at the hearing, and on which the DBS had been given no opportunity to respond. Those points were paragraphs 18-19

of the Judgment, and the grounds on which the DBS had made findings 2 and 3 (ground 1).

ii. The UT erred in law by taking the wrong approach to section 4(2) of the SVGA, particularly in relation to Finding 2 (ground 2).

iii. The UT erred in law in its approach to Finding 3, in particular in concluding that finding 3 'could not be relevant to barring' (ground 3).

iv. The UT erred in law in its findings in Section D of the Judgment. The UT criticised the DBS without finding any error of law or of fact (ground 4).

The UT's refusal of permission to appeal

55. The UT said that ground 1 referred to paragraph 18 of the Judgment. Paragraph 18 was supporting reasoning, so if it was wrong, an error was immaterial. The UT had not identified any error because it was not relying on any error 'except to support the reasoning we had already set out'. The UT continued, 'It was never identified as an error because we were not relying on the point except to support the reasoning we had already set out. As this was not material, there was no need to put it to DBS. Or to put it another way, the fact that it was not put to DBS is not an error of law. In any event it is surely uncontroversial that when additional information is provided, DBS must assess the evidence it has as whole'. The other points made in this ground, according to the UT, merged into points which the UT would go on to consider.

56. The UT rejected the DBS's argument about what amounts to an error of fact. If it was right, it amounted to an argument that an error of fact is the same as an error of law. That could not be right, as it would make section 4(2)(b) redundant (ground 2).

57. The UT considered ground 3 in paragraph 13 of its decision. It said that section 4(2)(b) has to be read in its context. It did not refer simply to findings of fact but to findings of fact on which the decision under appeal was based. 'In other words, it incorporates a concept of materiality. We were entitled to find that the mistake was to treat the findings as relevant. That is what we said in slightly different terms in paragraph 20 of our reasons'.

58. The UT said that, in Section D of the Judgment, it had considered an argument raised by JHB, as the opening words of paragraph 26 showed. The purpose of the comments was to deal with his argument and 'to assist the DBS in making a new decision'. The UT had not 'labelled each point we made as an error of fact or law, but the language used identified ways in which DBS's assessment of the evidence was flawed. We did not make any consequential findings of fact, because there were none to make. The reports would be before DBS and their significance would have to be assessed as part of the case as a whole in the light of the comments made by the tribunal. That assessment was a matter for DBS, as we did not make our decision on whether JHB should be removed from the lists' (paragraph 14).

59. The UT then made some general comments on the grounds of appeal. Section 4(2)(b) has to be given some meaning. The UT had applied the decision in *PF*. 'I do not accept that the position of [the UT] on an appeal from DBS is comparable to that of the Court of Appeal hearing an appeal from the High Court or County Court so that the approach to finding a mistake can be read across. The process undertaken by a

first instance judge is very different from the procedure followed by DBS' (paragraph 16).

60. It was unrealistic to apply a pleading approach 'restricting [the UT] to the precise terms of the grounds of appeal or its grant of permission. [The UT] acts in a more flexible way. This is especially so when the appellant is not legally represented. [The UT] acts in a more flexible way, within the limits of its jurisdiction, and DBS should attend a hearing on the basis that that is how [the UT] will proceed if appropriate' (paragraph 17).

The grounds of appeal

61. There are four grounds of appeal to this court. They correspond to the grounds of appeal before the UT (see paragraph 54, above).

Submissions

62. Ms Patry's written and oral submissions expanded on the grounds of appeal. The UT acted unfairly in two respects, by basing its decision on matters which were not in the grounds of appeal and which had not been canvassed with the DBS during the hearing. Those were the UT's criticisms of the DBS's approach to the credibility of victim 2, and the UT's criticisms of the DBS's approach to findings 2 and 3. The UT had misunderstood its powers and made its own findings of fact without identifying any errors of fact by the DBS.

63. She relied on the terms of section 4 of the 1999 Act (and of section 86 of the 2000 Act) (see paragraph 34, above), which clearly provided for a full appeal on the merits, and contrasted those with section 4. Ms Patry was asked what amounted to a finding of fact for the purposes of section 4(2)(b) of the SVGA. She submitted an inference about a person's state of mind involved a value judgment. Thus, whether or not victim 2 consented might look like a finding of fact but was, in truth, an assessment. She accepted that the DBS could not rely on a finding unless it found it proved on the balance of probabilities.

64. The DBS did not reject the reports. It gave them limited weight. The UT was wrong about finding 1. Finding 1 was not the conviction, but different and additional conduct by JHB against victim 1. The UT had not identified an error of fact in the DBS's approach to the reports. It was not clear what the purpose of section D of the Judgment was.

65. JHB made lucid and concise oral submissions. He was guilty of the Offence, and deserved to be put on the barred list then. His main argument was that the relevant conduct was many years ago. He was 19 years old when he was sentenced. He has come a long way since then and made much progress. He has had therapy, and gone on courses. He is in full-time employment in security work, and regularly deals with difficult members of the public, for example at a Christmas market. The police have never had an issue with him.

66. He does not understand why it is still necessary for him to be on the list. He has tried his hardest since 2009. He was worried that some incident in his work might mean that he accidentally broke the terms of the barring. He is now 38, and a father of three

children. He would not wish on anyone what happened to victim 1. He had put steps in place which would mean it could never happen again.

67. Victim 2 was 17, not 16. He had a nine-year relationship with her, and a child. They got back together again after her retraction statement. He did not buy alcohol. He was with a friend. She was sick. He took her clothes off, washed her and dressed her again. He put her to bed. She was too intoxicated to consent to having her clothes taken off and washed. All the allegations except one concerned adults, yet he was on the children's barred list. The UT did not show prejudice to the DBS in pointing out its errors. The court's place was to be fair. It should support and guide, even if it was not a trial, which is what the UT did. He was astonished that the DBS had called victim 2 a liar. She was not a liar. She did not know what had happened.

68. The Project was a charity for 16-25-year olds who have fallen out with their parents. They claimed housing benefit for their residents and gave them a little room. It was not fair to rely on finding 3. He could not defend himself in relation to an incident he knew nothing about. He had been friends with one of the victims for years. The first he knew about it was when he got the DBS letter, nearly 11 years later. He had no chance to give evidence, except at the UT. The two women were in his age range. He was 21 and they were 18 and 19. He did not understand what the issue was.

69. The DBS had been wrong to give no, or limited, weight to the reports. Mr Evans knew 'pretty much everything' and had considerable and relevant experience. The DBS should have given his evidence more weight. They had had many meetings, over hours and hours. He had done nothing since the allegations, which were about pre-historic events, ten or more years ago.

The relevant authorities

70. A useful starting point is the decision of this court in *Indrakumar v Secretary of State for the Home Department* [2003] EWCA Civ 1677, which concerned the jurisdiction of the Immigration Appellant Tribunal ('the IAT') to hear an appeal from an adjudicator. That jurisdiction was then conferred by paragraph 22(1) of Schedule 4 to the Immigration and Asylum Act 1999 ('the 1999 Act'). Paragraph 22(1) gave a person who was dissatisfied with a decision of an adjudicator an unqualified right of appeal to the IAT. On such an appeal, the IAT might 'affirm the determination or make any other determination which the Adjudicator could have made' (paragraph 22(2)).

71. In paragraph 13 of her judgment in *Indrakumar*, Hale LJ (as she then was) said that the IAT was no different from this court, or any other court with jurisdiction to hear appeals on fact and law. It could only interfere if there was an error, that is, if, on analysis, the decision of the adjudicator was wrong. It was not enough that the IAT might have reached a different conclusion. The application of the test would vary, depending on the nature of the evidence on which the finding of fact was based. Findings of fact based on oral evidence and an assessment of credibility could only rarely be overturned on appeal. Findings based on documentary evidence could be overturned more readily, unless they were linked to an assessment of credibility. The IAT was at least as well placed as an adjudicator to make findings based in conditions

in-country. The IAT would be entitled to draw its own inferences from such evidence if it detected an error by the adjudicator.

72. Laws LJ considered that passage in a later decision, *Subesh v Secretary of State for the Home Department* [2004] EWCA Civ 56; [2004] INLR 417. It was common ground in that appeal that paragraph 22 enabled the IAT to set aside a factual decision of an adjudicator (paragraphs 30 and 40). In paragraph 25, Laws LJ said that paragraph 22 conferred 'an unqualified right of appeal to the IAT, that is a right of appeal not limited by reference to issues of any particular kind such as matters of law (in contrast to the right of appeal to this court created by paragraph 23(1))'. The appellant in *Subesh* argued that the IAT could only overturn a factual decision of an adjudicator if his conclusions were 'plainly wrong or unsustainable' or outside the 'generous ambit within which reasonable disagreement is possible' (paragraph 27).

73. He said, in paragraph 40, that the IAT was not limited to a *Wednesbury* approach. He accepted, in paragraph 41, that the IAT must be slow to impose its view in relation to a finding which depended on an assessment of oral evidence. That had 'nothing to do with the reach of the appellate court's jurisdiction. It merely recognises the pragmatic limitations to which the appeal court, not having heard the evidence, is subject'. Finality was an important factor. The appeal was not a 're-run second time around of the first instance trial'. The appellant did not 'approach the appeal court as if, so to speak, he and his opponent meet on virgin territory. The first instance decision is taken to be correct until the contrary is shown…The true distinction is between the case in where the appeal court might *prefer* a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, *require* it to adopt a different view. The burden which the appellant assumes is to show that the case falls within this latter category' (paragraph 44) (original emphasis).

74. To detect an error and to substitute inferences were not part of a two-stage process; the error might be that the adjudicator had drawn the wrong inferences (paragraph 45). This court's reasoning was not 'merely …an exercise in the construction of paragraph 22'. The reasoning was based not on the statute, but on the principle of finality. 'It is what might nowadays be called the default position, defeasible in any particular case by a statutory provision inconsistent with it'. Laws LJ gave the example of an appeal from the magistrates' court to the Crown Court as 'in effect a new first instance hearing'. Evidence was called again. It might differ from the evidence in the magistrates' court. That process was different from the process which he had described, but did not undermine it. The regime in the Crown Court 'merely shows the working of a particular statutory regime as it has been interpreted. Cases where statute prescribes a specially restricted right of appeal will equally involve a departure from the default position' (paragraph 48).

75. In her skeleton argument, Ms Patry referred to two decisions of this court, *Kakh v ISA* [2013] EWCA Civ 1341 (paragraph 18) and *B v ISA* [2013] EWCA Civ 977; 1 WLR 308 in which this court explained the limited nature of the powers of the UT on an appeal from a decision of the DBS (or the ISA, as it then was).

76. More recently, in *AB v Disclosure and Barring Service* [2021] EWCA Civ 1575; [2022] 1 WLR 1002, this court considered another appeal from the UT. The DBS

appealed (on a point of law) against a decision of the UT. The respondent was a choir master who, by the time of the DBS review, had admitted sexually touching four female children in relation to whom he had been in a position of trust and that his motive was a sexual interest in them. He had hidden that conduct for 15 years. The view of the DBS was that he had little insight. The DBS rejected his claim that, as a result of a car accident in 2000, he was no risk to children. The DBS acknowledged the conclusions of an expert's report about whether he would, out of self-interest, exercise restraint in the future.

77. A was given permission to appeal to the UT. He had ten grounds of appeal (paragraph 24). The UT did not address those in its interim decision. It held that the DBS had made three fundamental errors of law which required it to set aside the decision of the DBS. They were that that decision was based on an implied assumption, which the DBS had not explained, in line with the expert's report, that self-interest was not a mitigating factor and that the DBS had failed to inquire into, or find facts in relation to, two incidents in 2002 (paragraph 26).

78. In paragraph 30 this court summarised the findings of fact on which, according to the UT, the DBS would have to base any new decision. In its final decision, the UT rejected a submission that it could only direct the removal of the respondent if that was the only decision which would have been open to the DBS on remittal. The UT had held that it could decide whether or not it was appropriate for the respondent to be included on the list. It directed the respondent's removal from the list.

79. In paragraph 43, Lewis LJ, giving a judgment with which the other members of this court agreed, said that the UT's role on an appeal was to consider whether or not the decision of DBS was legally or factually flawed. Unless the decision was flawed in that way, 'the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list…is a matter for the DBS'. In paragraph 44, he quoted paragraph 18 of *Kakh*. He said that the ISA, the predecessor of the DBS, had conceded that a point of law would include a *Wednesbury* challenge, but had submitted that it would not include a challenge to the 'balancing exercise' which was inherent in the question whether or not it was appropriate to keep a person on the list. The ISA was not a court of law. It did not have to engage, in the reasons for its decision 'with every issue raised by the applicant. It is enough that intelligible reasons are stated sufficient to enable the applicant to know why his representations were of no avail' (paragraph 45).

80. This court rejected the UT's reasoning in its interim decision (paragraphs 51-53). The UT had misunderstood the decision of the DBS. The UT had erred '[m]ore fundamentally' in its approach to the appeal. It had not limited itself to deciding whether or not the DBS had erred in law or fact and whether it had given adequate reasons. It simply disagreed with the DBS's reasons because 'it considered that the circumstances did not, in its view, justify a decision that it was appropriate to maintain [the respondent's] name in the …list. It based that view on its own assessment of [the respondent and his evidence, and its reading of the specialist assessment…and, it appears, its own assumptions…' (paragraph 54).

81. In paragraph 55, Lewis LJ made some observations about the UT's power to find facts. In making any such findings, the UT '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 fact that a person was married, and that the marriage subsisted, may be findings of fact. Whether the marriage is 'strong' or 'mutually supportive' may be more of a value judgment 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 risk. 'The third "finding" would certainly not involve a finding of fact'. The UT would also have to consider carefully whether it was appropriate to set out findings of fact when remitting a case to the DBS. 'For example, it 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 …list …is for the DBS, the [UT] will have to consider whether, in context, it is appropriate for it to find facts on which the DBS will base its new decision' (paragraph 55). In this case, the 'findings of fact' flowed from the UT's failure to understand the decision of the DBS. 'Further and separately, they result from a failure on the part of the [UT] to appreciate its proper role on an appeal. The "findings" result from the fact that the [UT] was, on analysis, improperly considering whether on the evidence it was appropriate to include [the respondent] within the …list which was a matter for the DBS to assess, not the [UT]' (paragraph 56). There were specific defects with each of the 'findings of fact' directed by the UT (paragraphs 57-59). They included that one 'finding of fact' was not a finding of fact at all and that one was 'a judgment or an expression of view about a fact, not a finding of fact'.

82. In paragraph 68, Lewis LJ said that it was clear from the statutory scheme as a whole that the DBS was 'the body charged with decisions on the appropriateness of inclusion of a person within the …list'. The context did not indicate that the UT 'is intended to be free to decide for itself questions concerning the appropriateness of inclusion of a person in the barred list'.

83. In paragraph 73, he added that it was not difficult to think of examples of cases in which removal from the list would be the only decision which was open to the DBS on remittal. The DBS might have found one incident of sexual misconduct. 'If, on the facts, it transpired that the conduct had not in fact occurred (or AB had wrongly been identified as the person responsible) and the person had not been guilty of the conduct, there would be no basis for including that person in the …list and the [UT] could direct removal'. If two incidents were relied on and the UT found that only one had occurred, the case should be remitted to the DBS for it to decide the question of appropriateness. That interpretation was consistent with a decision of the UT in another case. This court remitted the respondent's appeal to the UT for it to consider his ten grounds of appeal (paragraph 78).

84. Ms Patry also cited paragraph 2 of the decision of this court in *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48. This case is only indirectly relevant, for reasons which I will explain in paragraph 95, below. For present purposes, I note two points which Lewison LJ made in paragraph 2 of his judgment. In paragraph 2.ii) he said that 'What matters is whether the decision under appeal is one that no reasonable judge could have reached'. In paragraph 2.v), he said that an appeal court could set aside a judgment 'on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable'.

85. Ms Patry referred to the recent decision of a Presidential Panel of the UT, *PF v Disclosure and Barring Service*. One of the members of that panel was a member of the UT in this case. Farbey J had identified 'an issue of interpretation' which arose in that appeal and in other appeals. She directed that it should be decided as a preliminary issue (paragraph 2). That issue was 'the proper approach for the [UT] to take on challenges under section 4(2)(b) of [the SVGA] to findings of fact made by the DBS' (paragraph 3).

86. The appellant in that case submitted that fairness demanded 'a full appeal on the facts before an independent and impartial tribunal' (paragraph 5). The UT defined the issue between the parties as whether the decision of the DBS was the starting point, or whether the question whether the DBS had made a mistake of fact should 'be at large as part of the analysis of the evidence' (paragraph 10). The UT did not consider that section 4(2)(b) was ambiguous (paragraph 21). Section 4 confers a right of appeal 'against some but not all, aspects of the decision to include a person on a list' (paragraph 22). The variety of different types of rights of appeal, and their different contexts, meant that there was no helpful analogy (paragraph 23).

87. Section 4 was unusual, as the UT's usual jurisdiction was to hear appeals on points of law from the First-tier Tribunal (paragraph 24). Section 4(2) and (3) define the UT's jurisdiction: section 4(2) confers jurisdiction and section 4(3) limits it. An appeal might give a right to challenge three elements of a decision; the facts, the law, and an exercise of judgment (paragraph 27). There were two phases on an appeal for which permission had been given: the 'mistake phase' and the 'disposal phase'. The question in the first phase was whether or not the UT should confirm the decision (paragraph 28). The issue in the second phase was whether to direct removal or to remit the case to the DBS. It was important to keep the phases separate because section 4(3) only applies to the mistake phase.

88. The UT has to confirm the decision of the DBS unless it finds a mistake in it (paragraph 37). There was no reason to qualify the word 'mistake'. The UT referred to the relevant test, which is whether a decision is 'wrong', and to *Henderson v Foxworth Investments* [2014] UKSC 41; [2014] 1 WLR 2600 at paragraph 62. It was not enough that the UT would, itself, have made different findings (paragraph 38). The UT gave examples of mistakes of fact in paragraph 39. The mistake might be one of primary fact, or the drawing of a wrong inference (paragraph 41). One way of showing that there was a mistake of fact was to call further evidence and to show that a wrong finding had been made (paragraph 42).

89. In paragraph 43 the UT contrasted appeals to this court with appeals from administrative decision makers. Section 4 applied in the second type of case, and *Ladd v Marshall* [1954] 1 WLR 1489 did not apply. The UT could hear evidence which was not before the DBS (paragraph 43). There was a range of possibilities. If the UT heard no new evidence, the decision of the DBS might well be the starting point. If the UT heard 'significant new evidence' it would be likely that the DBS's evaluation of the evidence would be overtaken, so that the only appropriate approach for the UT would be to start afresh (paragraph 49). The UT summarised its conclusions in paragraph 51.

Discussion

90. On his appeal to the UT JHB did not challenge either the facts underlying the conviction or finding 1 (see paragraph 9.i., above). This was a case in which the UT heard very limited evidence from JHB, for example, that he had not been interviewed by the police about the allegation on which finding 3 was based. The UT does not seem to have heard much evidence which had a direct bearing on the matters on which the DBS relied in making findings 2 and 3, let alone any significant evidence. On the reasoning in *PF*, the decision of the DBS was therefore the starting point for the UT's consideration of the appeal. JHB did not claim that the DBS had erred in law. The UT could not exercise any powers on the appeal, therefore, unless it identified an error of fact in the approach of the DBS to the findings of fact on which the Decision was based. Those findings were the conviction for the Offence, which JHB did not challenge, finding 1, which JHB admitted, and findings 2 and 3. Those findings of fact did not include the DBS's assessment of the weight to given to the reports. The UT was not free to make its own assessment of the written evidence unless, and until, it found such an error.

Finding 2

91. Grounds 1 and 2 both concern finding 2. It is convenient to consider them together, but in reverse order. The starting point is that I reject Ms Patry's submission that a finding about whether a person is too drunk to be able to consent to sex is not a finding of fact. There is a distinction between the assessment of the evidential material on which a finding of fact is or might be based, and an assessment or value judgment, such as an assessment of risk, which is based on findings of fact which have already been made.

92. The UT began its consideration of finding 2 by announcing that the DBS 'made a mistake with this finding'. The UT did not, in paragraphs 9-19, explain in what way finding 2 was 'wrong', or outside 'the generous ambit within which reasonable disagreement is possible'. Its approach, rather, was to look at very substantially the same materials as the DBS, and to make its own findings of fact ('These are our findings'). Those findings were different from the DBS's assessment of those materials. I infer that what the UT meant when it referred to a 'mistake' in the first sentence of paragraph 9 was that the DBS had a mistaken view of the facts because the UT happened to differ from the DBS in its assessment of the same or very nearly the same materials.

93. That inference is supported by the explanation which the UT gave for its different assessment of the materials. The core of that difference was that the UT considered that 'the evidence does not allow a finding that [the intercourse] was non-consensual' (paragraph 9) because although the evidence showed that, during the evening, victim 2 was 'often' not capable of consenting, the UT could not be 'sufficiently confident that at the moment when sex took place, she was not able to consent' (paragraph 17). That is a difference in the assessment of the evidence on which a finding of fact is, or might be, based. On the authorities, a disagreement about the evaluation of the evidence is not 'an error of fact'. In my judgment the material considered by the DBS did permit such a finding on the balance of probabilities. If such a finding was open to the DBS on the balance of probabilities, the DBS did not make a mistake in coming to that finding.

94. Although this is legally irrelevant, I also consider that the DBS's assessment of the evidence is considerably more realistic than the UT's. It is hard to see what evidence could possibly enable a fact-finder to be 'sufficiently confident' that victim 2 was or was not able to give consent at a precise point in an evening during which she was 'often' not capable of consenting, and in circumstances where the timing of the moment of intercourse was not known on the evidence. But in this case, such considerations do not arise. There was ample material, which is fully described in the Decision Records, from all present, including from JHB himself, that victim 2 was very drunk indeed, and that her condition got visibly worse as the night went on. The DBS was entitled to draw, from that evidence, the inference, on the balance of probabilities, that victim 2 was not able to consent to it when intercourse took place.

95. The UT's reasons for refusing permission to appeal on ground 2 give a clue to its approach. It seems to me that the UT understood the DBS's reliance on paragraph 2 of *Volpi v Volpi* as a submission that, in order to show that there has been 'a mistake of fact' it is necessary to show that there was no evidence to support that finding, or that it was irrational. I agree with the UT that if that were the position, section 4(2)(b) would be redundant. But, in my judgment, that is not the position on an appeal such as this, for two reasons. First, a finding may be 'wrong' for this purpose, even if there was some evidence to support it, or it was not irrational, as the reasoning in *Indrakumar* and *Subesh* shows. Second, a finding may also be 'wrong' for the purposes of section 4(2)(b) if it is a finding about which the UT has heard evidence which was not before the DBS, and that new evidence shows that a finding by the DBS was wrong, as the UT itself explained in *PF* (see paragraphs 63-65, above). I agree with the UT that *Volpi v Volpi* is not, in one respect, directly relevant to appeals under section 4 of the SGVA. *Volpi v Volpi* was an appeal from a court. As the UT in *PF* and in this case correctly understood, these are appeals from an administrative decision-maker, not from a court. That means that *Ladd v Marshall* does not apply to these appeals, so that, in an appropriate case, the UT can hear relevant evidence which was not before the DBS. *Volpi v Volpi* and *Subesh*, both of which concern appeals from courts or tribunals, are nevertheless relevant, however, to an appeal such as this, because they explain the extent of an appeal court's powers on a factual appeal, and thus, in this different context, what it means to make a mistake in a finding of fact.

96. I turn to ground 1. In its decision refusing permission to appeal on ground 1, the UT did not suggest that it did canvas the arguments in paragraphs 18-19 of the Judgment with the DBS at the hearing. So I infer that this aspect of ground 1 is factually correct. The UT explained that its reasoning in paragraphs 18-19 is, in effect, merely support for its decision about finding 2, which stands or falls on its reasoning in paragraphs 9-17. It is on that basis that the UT said that if the reasoning in paragraphs 18-19 was wrong, any error was 'immaterial'. If this part of the UT's reasoning truly is 'immaterial', then I and the DBS can ignore it; but if it is immaterial, I do not understand why the UT mentioned it.

97. Nevertheless, in case the UT's analysis of its own reasoning is, itself, incorrect, I should consider whether, if the UT did, in substance, rely to any extent on the reasoning in paragraphs 18-19, it was guilty of a procedural irregularity. I consider that, if and to the extent that the UT did, in substance, rely on this reasoning in the Judgment, there was a procedural irregularity. It acted unfairly in basing any part of

its decision on this reasoning, as it had not given the DBS a chance to comment on it. If it was going to base any part of its decision on this point, it should have given the DBS notice of this proposed reasoning. The UT's explanation for its approach in its decision refusing permission to appeal (see paragraph 80, above) suggests that the UT's understanding of its powers on an appeal was mistaken. An appeal under section 4 of the SVGA can only be made with the permission of the UT after the UT has considered whether the grounds of appeal fall within the scope of section 4(2), and only to the extent that they do (section 4(4)). Section 4 does not give the UT power, once it has given permission to appeal, to enlarge the scope of the appeal beyond the limits of the grant of permission.

98. Again, although this point is legally irrelevant, and we heard no argument on it, I cannot see any error in the DBS's approach to the weight to be given to victim 2's retraction of the allegation which was the basis of finding 2. The cases on which the UT relied appear to me to deal with a different issue. That issue is the relationship between expert evidence in a case and the assessment of the credibility of the witnesses of fact. Those cases do not obviously support the legal principle which the UT derived from them. In this case, the DBS reached a conclusion, on the balance of probabilities, and on all the evidence about victim 2's state on the evening in question, which could support that finding that victim 2 was too drunk to consent to sex. If she was too drunk to consent to sex, I cannot see how the DBS can be said to have erred in any way in deciding that her later statement that JHB did not 'rape' her did not undermine the victim 2's 'previously established credibility'; or to put it another way, that the retraction did not undermine the conclusion that victim 2 was too drunk to consent. The terms of the retraction had no logical bearing on the conclusion about victim 2's state, which was based on an assessment of other evidence as well as hers.

99. I would therefore allow the appeal on grounds 1 and 2.

Ground 3

100. The error in finding 3 which the UT detected was that it was not detailed enough, or was too general, to be 'relevant to barring'. That is a difference of opinion about the significance which should properly be attributed to a finding. The UT did not say that the DBS's assessment of the significance of finding 3 was not open to the DBS. It would have erred in law if it had, because this assessment of the significance of finding 3 plainly was open to the DBS, as the specialist decision-maker, and was not a finding of fact. Moreover, it was an assessment which paragraph 13(1) of Schedule 3 to the SVGA required the DBS to make. The DBS was entitled to find that this material showed that JHB had behaved recklessly very soon after this release from serving his sentence for the Offence, and that this reckless behaviour was relevant to barring. The UT did not identify any error of fact in finding 3. I would allow the appeal on ground 3 for that reason alone. It is not necessary for me to express a view about whether the UT's approach to finding 3 contravened section 4(3). I incline to the view that it did not; finding 3 is not the barring decision itself, but a finding on which that decision was based. So, if contrary to my view, finding 3 had been based on error of fact, that would have been a proper ground of appeal to the UT.

Ground 4

101. Neither the Judgment nor the UT's decision refusing permission to appeal explains the purpose of Section D of the Judgment. In Section D, the UT announced, without explanation, that JHB was 'entitled to credit for' the reports. It went on to say, again without explanation, that three factors 'should have been treated as significant in favour of' the reports. Section D does not identify any error of fact or law. In Section D, rather, the UT explains why, in its view, which was different from the view of the DBS, the reports should be given more weight than the 'very limited weight' which the DBS thought they should be given. The UT had no power to make the observations which it made in Section D. I would allow the appeal on ground 4.

Conclusion

102. For those reasons I would allow the appeal on all four grounds and would remit JHB's appeal to the UT to be re-heard.

Lord Justice Baker

103. I agree.

Lord Justice Lewison

104. I also agree.