Neutral Citation Number: [2024] EWCA Civ 95

Case No: CA-2022-001651

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL JUDGE HEMINGWAY
UPPER TRIBUNAL MEMBERS GRAHAM AND JACOBY
UA 2020 00408 V

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2024

Before:

LORD JUSTICE BEAN
LORD JUSTICE MALES
and
LORD JUSTICE LEWIS

- -

Between:

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

- -
- -

Carine Patry KC (instructed by **DBS**) for the **Appellant**
Edward Kemp and Tom Gillie (instructed by **Advocate**) for the **Respondent**

Hearing date: 1 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. This is an appeal by the Disclosure and Barring Service ("DBS") against the decision of the Upper Tribunal (Administrative Appeals Chamber) ("the UT"), of 18th May 2022. By that decision, the UT allowed RI's appeal against the decision of the DBS, embodied in a letter of 25th March 2020, to include her in the Adults' Barred List and directed that her name be removed from the Barred List. Both RI and the service user RV are entitled to anonymity.

Factual and procedural background:

2. RI previously worked as a support worker for vulnerable adults with learning disabilities. This was a role she held from around 2002 when she was employed by Choice Support Group. In April 2011 Metropolitan Thames Valley Housing ("MTVH") became her employer. It was around this time that she was allocated to work with the service user, RV. RV has learning disabilities and health needs due to his diagnosis of Myotonic Dystrophy. He lived independently but relied on the support of RI, including to manage his finances.

3. RI ceased to be RV's support worker in August 2018. MTVH subsequently formed the view that RI might have stolen money from RV, and she was suspended pending investigation in November 2018. The internal investigation concluded that between January and September 2018 RI stole a total of £2,800 from RV. In March 2019 this information was reported to the police who interviewed RV and RI. Disciplinary proceedings concluded with RI being dismissed by MTVH on 29th April 2019. The disciplinary outcome letter stated that she had "financially abused a vulnerable person", an action constituting gross misconduct, and further informed her that a referral would be made to the DBS. On 4th July 2019, the police closed the investigation into RI due to there being "insufficient evidence to proceed". RI instigated proceedings for unfair dismissal against MTVH which resulted in an out of court settlement for £15,000.

4. The DBS sent RI a "Minded to Bar letter" dated 14th January 2020. RI took the opportunity afforded to her to make written representations to the DBS, sent on 2nd March 2020. After considering the representations and all the evidence before it, the DBS notified RI of its decision to include her in the Adults' Barred List by letter of 25th March 2020.

5. RI, who denied that she had stolen from RV, was granted permission to appeal by UTJ Hemingway at an oral hearing on 26th February 2021. An oral hearing took place on 26th April 2022 before UTJ Hemingway and UT Members Graham and Jacoby. Both parties were represented by counsel. The Appellant gave evidence and was cross-examined. The UT allowed the appeal and directed RI's name be removed from the Barred List by its decision promulgated on 18th May 2022.

6. On 18th July 2022, permission for the DBS to appeal to the Court of Appeal was refused at first instance by UTJ Hemingway. By order of 18th April 2023, I granted permission to appeal to the Court of Appeal on the basis that the grounds of appeal in this case and another case, *JHB v DBS*, raised an important point of principle, but refused an application to stay the order of the UT that RI's name be restored to the Barred List pending the appeal. The appeal was stood out pending judgment in the case of *JHB*.

7. On 19th June 2023, I refused an application to vary my order of 18th April 2023. I ordered the DBS to comply – which, deplorably, it had not already done despite the lapse of more than a year – with the direction of the UT to remove RI's name from the Barred List.

8. Judgment in *JHB*, to which I shall return later, was given on 17th August 2023. The parties to the present appeal were directed to file supplemental skeleton arguments addressing the decision in *JHB.*

Relevant statutory and procedural framework:

9. The DBS is mandated to maintain the Adults' Barred List and the Children's Barred List by s.2 of the Safeguarding Vulnerable Groups Act 2006. By s.3 of the Act, a person is barred from regulated activity in relation to children if included in the Children's Barred List, and from regulated activity in relation to vulnerable adults if included in the Adults' Barred List. The DBS has the power to include a person in the Adults' Barred List under paragraph 9 (relevant conduct) and paragraph 11 (risk of harm) of Schedule 3 to the Act.

10. An individual's right to appeal from a decision of the DBS to the UT is contained in s.4:

> "4 Appeals
>
> (1) An individual who is included in a barred list may appeal to the [UT] against–
>
> (a) […]
>
> (b) a decision under [paragraph 2, 3, 5, 8, 9 or 11] of [Schedule 3] to include him in the list;
>
> (c) […]
>
> (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 [UT].
>
> (5) Unless the [UT] finds that [the DBS] has made a mistake of law or fact, it must confirm the decision of [the DBS].

> (6) If the [UT] finds that [the DBS] has made such a mistake it must–
>
> (a) direct [the DBS] to remove the person from the list, or
>
> (b) remit the matter to [the DBS] for a new decision.
>
> (7) If the [UT] remits a matter to [the DBS] under subsection (6)(b)–
>
> (a) the [UT] may set out any findings of fact which it has made (on which [the DBS] must base its new decision); and
>
> (b) the person must be removed from the list until [the DBS] makes its new decision, unless the [UT] directs otherwise."

11. The right to appeal from a decision of the UT to this court is provided by s.13 of the Tribunals, Courts and Enforcement Act 2007: it is confined to "any point of law arising from a decision made by the UT" (other than an "excluded decision", a category which is not relevant to this case).

The DBS decision:

12. The DBS sent RI a "Minded to Bar" letter on 14th January 2020. After considering written representations from RI the DBS took the decision to include RI on the Adults' Barred List. By letter dated 25th March 2020, the DBS explained the reasons for reaching this decision as follows:

> "The DBS is satisfied that you have previously been engaged in regulated activity with vulnerable adults. This is because you were previously employed as a Support Worker at Metropolitan Thames Valley Housing.
>
> Having considered all to the information available to it, the DBS is satisfied that you have engaged in relevant conduct in relation to vulnerable adults, specifically, conduct which endangered a vulnerable adult or was likely to endanger a vulnerable adult.
>
> The reason we have concluded the above is that we have considered your representations and are satisfied that, on the balance of probabilities, between January 2018 and September 2018 you stole £100 cash withdrawals totalling £2800 that service user [RV] had made from his savings account.
>
> In your representation you provided details of how you kept a log of withdrawals from the Halifax account, with £300 being withdrawn per week. However, no logs were kept for the withdrawals from the service user's NatWest account as you let the service user take control of that amount to spend as part of his skill teaching. You said you did not have authority to prevent him from applying freewill to his expenditure.

However MTVH policy states it is not mandatory to record all financial transactions for Level 1 customers when supporting them with their finances, however the policy makes clear that if there was a need for this to be done it should be recorded in the care plan. This service user's financial capability assessment, which was written and signed by you, states that all transactions are recorded. The fact that service user's financial capability assessment was written and signed by you supports that you were well aware that there was a requirement for all the transactions that were made by the service user to be documented.

It was highlighted that the service user did not actually make any complaint and when spoken to could not actually remember certain dates. In addition the service user is seen as a person who does have capacity and can manage some elements of his finances without staff support.

It is acknowledged by the DBS that the service user had learning disabilities and some health needs due to his diagnosis of Myotonic Dystrophy which also causes a slight slur to his speech. However, it is documented that he needs assistance from a Support Worker in all aspects of his life, including his finances and whilst the service user does have some access to his own finances this is in a supervised capacity.

The allegation came to light following the completion of an internal audit of the service user's finances. When the service user was questioned whilst he was unsure on specific dates, he was very clear that about the amounts of money he was withdrawing and that he was giving all of the money to you. You had been caring for the service user for a period of 18 months so it is likely you previously had a good relationship and therefore it is considered there is no apparent motivation for him to make a malicious allegation against you.

You correctly highlighted that the service user likes to spend his money on Disney items and wigs, and you stated you did raise the excessive spending with the service user's key worker.

It is acknowledged that the police confirmed that the service users flat is full of Disney dolls, Disney DVDs and that the service user wears different princess wigs. However, your account is undermined by the fact that the service user's key worker confirmed they had no recollection of that conversation taking place. In addition, from the time she started supporting the service user in September 2018 to March 2019 the service user had never withdrawn or asked for additional money totalling £100 per week, or anything close to it, on top of his £300 per fortnight. This is supported by the savings amassed by the service user in the period since you were dismissed. Which

> is not consistent with your account that the service user was wasteful with his money.
>
> Furthermore you also provided an inconsistent account when questioned by the police by suggesting that the service user had spent the money on sex. Something that you had never brought up previously to your employer and something that you would have been expected to disclose in order to safeguard the service user.
>
> You provided information in your representations of how you decided to take your dismissal to an employment Tribunal and MVT decided to settle that matter outside of Court. Whilst you appealed and were taking the matter to an employment Tribunal this does not alter the considerations or findings made by the DBS. The findings are made on the evidence presented in the case material. MVT's decision to settle out of court could have been for any number of reasons and are not consideration for the findings that have been made in this case.
>
> It is acknowledged by the DBS that you were not convicted of any offence in relation to the allegation that was made against you, however the DBS works to a lower burden of proof. The decision to take action against you by the police was due to the criminal threshold being beyond reasonable doubt.
>
> It is further acknowledged by the DBS that you previously had an unblemished career prior to this incident and that you have been employed since the incident absent of any concerns and that you provided credible references to support this.
>
> However, the DBS is now satisfied that you abused your position to facilitate the thefts in this case and it is likely that similar opportunities would be present in regulated activity with vulnerable adults in the future. It is believed that as you only stopped when you were caught, that you may act in the same way again if afforded similar opportunities. If you were to repeat your behaviour this would cause further financial and emotional harm to vulnerable adults. Consequently, the DBS is now satisfied that it is appropriate to include you in the Adults Barred List".

13. RI sought permission to appeal to the UT, denying she had stolen any money from RV as alleged or at all. RI accepted she had been dismissed following a disciplinary procedure but referred to previous difficulties with her line manager and team leader. She stated that she had made a claim for unfair dismissal which resulted in an "out of court settlement" for £15,000. She further relied on the fact that the police had decided not to prosecute following an investigation.

The UT decision:

14. The UT allowed RI's appeal against the decision of the DBS of 25th March 2020 and directed that her name be removed from the Adults' Barred List. The UT made a finding of fact that "the appellant did not steal any money from RV at any time during the course of her employment and her duties as a key worker and/or support worker" and held that "in deciding otherwise the DBS did make a mistake as to fact". The following evaluation of the evidence is set out in paragraphs 24-39 of the decision:

> "24. In deciding this appeal, we have taken into account all of the documentary material before us including the written arguments contained in the DBS's response to the appeal and the appellant's reply to the response. We have taken into account all of what was said at the hearing including the oral evidence of the appellant and the oral submissions of the two representatives. As is clear from what has been said above, this was purely an error of fact case. The appellant's position was that the DBS had made a mistake of fact in concluding that she had stolen money from RV and that that was a fact on which the decision to include her in the Adults Barred List was based. The DBS position was that its finding as to theft was correct so that there had been no mistake of fact at all.
>
> 25. In asking ourselves whether the DBS has made the mistake of fact as alleged, we have reminded ourselves that it is not enough that the Upper Tribunal would have made different findings (see paragraph 38 of PF). We have reminded ourselves of what was said by the Court of Appeal in AB, cited above, with respect for the need to distinguish findings of fact from value judgments. But here, we are dealing with straightforward facts rather than inferences or evaluations of any sort.
>
> 26. We have, in considering whether the DBS has made a mistake of fact, had the benefit of all of the documentary evidence which was before it and which was properly and fully disclosed pursuant to the Upper Tribunal's directions. We have had, in addition to that, the valuable benefit of hearing oral evidence from the appellant and of having that evidence tested by way of cross-examination and probed by further questions asked by the Upper Tribunal's panel members. We have had the valuable benefit of hearing oral submissions as to the issue from the two representatives as well as written arguments in the response and reply referred to above. As already noted, we are not restricted to a consideration of the material which was before the DBS when it made its findings of fact and its decision (see paragraphs 42 and 51(c) of the decision of the Upper Tribunal in PF). We have the DBS reasoning as set out in its decision letter before us and we have taken account of it for what it is worth in the context of the evidence as a whole (see paragraph 49 of PF). We acknowledge the DBS's experience in fact-finding but, given the circumstances obtaining in this appeal, we have noted the comments of the Upper Tribunal in PF to the effect that it is

doubtful "that the DBS has much to teach judges about assessing hearsay evidence or about drawing inferences, both of which are well within the range of skills deployed by judges in all courts and tribunals at all levels" (paragraph 48 of PF). But we do bear in mind that aspects of the DBS's reasoning may assist us in making our own assessment of the evidence which is before us and which, as we have already said, is now a fuller body of evidence than that which was before the DBS. We have borne in mind that it is for the appellant to show, to a balance of probabilities, that the DBS has made a mistake of fact.

27. Having heard from the appellant we have undertaken an assessment as to her credibility. In doing so, although we have set out the various matters which we have taken into account sequentially (which of course is inevitable) we wish to stress that we have considered all the factors below, together, as one composite whole, prior to reaching a view as to credibility and prior to deciding whether, in making the findings it did, the DBS made a mistake as to fact.

28. We were impressed by the claimant's oral evidence. It was, in our judgment, given in what was largely a clear and straightforward manner. We did not detect any internal inconsistencies in the oral evidence nor any inconsistencies with her written evidence as set out in her written statement. Further, Mr Serr did not expose any such inconsistencies in his cross-examination nor did he point us to any such inconsistencies in his closing submissions. None of that, of itself, means that the appellant was telling us the truth. But it points, when taken along with other factors, to a conclusion that she might well have been.

29. The appellant has been steadfast, throughout the disciplinary proceedings brought by employer B, the DBS investigation and these proceedings, regarding her innocence. Of course, it might be said that she is simply a consistent and determined liar. But we do give her a degree of credit for her consistent denials over a protracted period. We appreciate that the specific allegation that RV was paying persons for sexual services was not (on our scrutiny of the papers) made prior to police involvement or was, in any event, made at a relatively late stage. But the allegation is not out of line in any sense with the appellant's earlier assertions as to general financial irresponsibility and we do not think the specific allegation of paying for sexual services takes matters very much further or significantly buttresses the appellant's case anyway. We do not conclude, therefore, that it was an artificial embellishment made to falsely enhance her prospects of success either in resisting a criminal prosecution or in succeeding in these proceedings.

30. The appellant has been employed as a support worker and/ or keyworker since 2001 or 2002. It seems to have been accepted

by the DBS that there is no evidence of any other similar complaints touching upon alleged dishonesty, having been made against her in the course of that employment. She told us that there had been no such complaints and she told us that she had not, apart from the police investigation involving the allegations of financial irregularities concerning RV, been involved in any other police investigations regarding dishonesty. Such was unchallenged or not seriously challenged and we accept all of that. Of course, it is always possible that a person of previous good character will find themselves tempted into offending for personal gain. We keep that possibility in mind. But, nevertheless, we think that the appellant would have had opportunities to financially exploit people over a number of years had she wished to. Against that background we take the view that her previous good record makes it less likely that she has stolen money from RV.

31. There is, in our view, a lack of reliable direct evidence pointing to the appellant having stolen money from RV. We do accept, as Mr Serr points out in closing submissions, that RV did indicate that the claimant had stolen money from him. The written material provided by the police (see page 99 to 103 of the Upper Tribunal's appeal bundle) indicates that he had "confirmed the allegation made by the third party". But we are not told precisely what he had to say or why it is that he believes the appellant, as opposed to say some other individual or some other support worker, has stolen his money. Further, the same documentation emanating from the police indicates that he was not able to provide details with any degree of specificity. When Upper Tribunal Judge Hemingway granted permission to appeal, he observed that appeared to be a lack of written evidence regarding what RV had had to say about the allegations and that remains the case now. In these circumstances it is difficult for us to attach any more than limited weight to the fact of the allegation made by RV. We also attach some weight to the appellant having given a "commented" interview to the police. It is unfortunate that we do not have a copy of the record of the police interview, but we give a degree for credit to her for actually responding to and answering the questions put to her. We do not attach weight to the decision not to prosecute as such, because of the stringent standard of proof (beyond reasonable doubt) applicable in criminal proceedings but we find ourselves in agreement with the police view that the direct evidence against the appellant (as opposed to circumstantial evidence which we shall comment upon below) appeared unpersuasive.

32. The appellant gave evidence to the effect that other support workers would have had the opportunity to deal with RV's finances during the period of January to September 2018. Her evidence on that point was not the subject of any serious

challenge and we accept it. Thus, we conclude there would have been others with opportunities to steal money so that this is not a case where the appellant was necessarily the only candidate.

33. The appellant told us, and again this was not subject to challenge, that RV had requested her to accompany him on a trip to Disneyland Paris and that, notwithstanding that she had by then ceased to be his keyworker, she had done so in the course of her employment. Whilst we have noted that the documentation does appear to indicate that RV had accused the appellant of stealing from him, that does, on the face of it, appear to sit unhappily with his apparent enthusiasm that she, as opposed to some other employee of employer B, should accompany him.

34. The appellant's evidence both orally and in writing was to the effect that frequent audits, sometimes without notice, would be carried out by staff of employer B. The frequency with which she suggests such audits took place does appear to be surprising, but no challenge was made with respect to her evidence on that point. We are prepared to and do accept that there would have been audits of some frequency and that the timing may have been unpredictable. That being so, we think such would have served as a disincentive to the appellant or anyone else to steal money from service users in the way that it has been alleged that this appellant did. That is not, at all, a decisive consideration but it affords some support for the proposition that the appellant did not steal money from RV.

35. The appellant described a time when RV had invited a stranger into his home with the consequence that a safe in which some of his money was kept, was stolen. Again, that part of her evidence was not challenged, and on balance we accept it as being truthful and accurate. That serves to illustrate, consistent with his former ability, that he is a person who might easily be exploited on financial grounds by unscrupulous individuals. That raises the possibility that someone other than the appellant might have exploited him in that way.

36. We accept that the arrangement described by the appellant, whereby the sum of £100 was transferred to a cash card account and then spent by RV, has not been evidenced in documentation before us but the lack of documentation of itself does not mean that such an arrangement was not in place. We note Mr Serr's contention that the making of such an arrangement with a view to spending rather than saving is improbable. But whilst the making of such an arrangement might seem odd, we are not persuaded that its setting up is inconceivable. Further, we accept a view might have been taken that affording RV a limited amount of freedom to spend a limited amount of money as he wished, might have led to him spending less money overall. We

also note that we have received no evidence provided for the purposes of these proceedings before us, from employer B or any of its staff, refuting the claimed existence of such an arrangement.

37. We note that the disciplinary proceedings resulted in a finding of gross misconduct and the appellant's dismissal. We attach weight to that. But we are not bound by the findings. We note the contention that no co-worker had acted as a witness for the appellant in those proceedings. But we do not find that to be damning because there might be any number of reasons why former colleagues would not wish to involve themselves in such proceedings. Mr Serr argues that the disciplinary proceedings were evidently thorough and that we should draw no conclusions from the fact of the subsequent £15000 settlement reached as a result of the institution of Employment Tribunal proceedings. We are in a good position to make up our own mind on the evidence, notwithstanding what might be thought to have been the thoroughness of the disciplinary process. We attach only little weight to the £15000 settlement, but despite what Mr Serr has to say about that we do take the view that it would appear to represent a substantial settlement and more than what might be properly characterised as a nuisance value settlement. But, of course, we do not have access to the reasons as to why such an offer was made or accepted.

38. We are concerned as to the apparent ability of RV to save money once the appellant had ceased to be his keyworker. We are also concerned about the fact that, notwithstanding the appellant says she spoke to the new keyworker about RV's financial profligacy, she has no recollection of it. But the lack of recollection on the part of the keyworker does not, of itself, mean that no such conversation took place. Whilst the keyworker appears to have described RV as being "very frugal" the totality of the evidence does not necessarily point that way and at the police visit to his home a number of Disney items were noted to be present and, of course, the appellant has indicated that he would spend money on frivolities such as that. There might have been other causes unrelated to the appellant's cessation of her duties as a keyworker, which impacted upon his spending habits.

39. Stepping back and taking an overall view we recognise that this is not a case where all of the evidence points one way. But we are satisfied, taking everything into account, that the appellant, from whom we heard in some detail and who we had an opportunity to assess while she was giving her evidence, did not steal any money from RV. The evidence as to that might justify some suspicion but it does not, in our considered view, justify anything more than that."

15. The UT concluded that in the light of its findings, it was bound to direct the removal of RI's name from the Adults' Barred List, rather than remitting the matter to the DBS (following *AB v DBS* [2021] EWCA Civ 1575, [2022] WLR 1002). The DBS's decision rested solely on its finding concerning theft and "[n]o other failings on the part of the appellant which would be capable of justifying placement on the Adults' Barred List [were] identified or relied on by the DBS".

Grounds of appeal to the Court of Appeal:

16. The DBS advances three grounds of appeal to this court, of which the first is by far the most important:

Ground 1: The Tribunal erred in law by adopting an impermissible approach to s 4(2) of the 2006 Act, contrary to case-law.

Ground 2: The Tribunal erred in law in its conclusion that others may have stolen the money, as there was no evidence at all to support this, and neither party had advanced this position; and

Ground 3: The Tribunal reached two further conclusions which were plainly wrong or alternatively failed to take into account material considerations which disproved the conclusions reached.

Ground 1: Error of law in the UT's approach to the mistake of fact jurisdiction on appeal from the DBS

17. Section 4 of the 2006 Act creates an unusual jurisdiction. An appeal to the UT may be made on the grounds of either a mistake of law (s.4(2)(a)) or a mistake in any finding of fact (s.4(2)(b)) on which the decision was based, but s.4(3) lays down that the UT may not decide whether it is appropriate for the appellant to be included in a barred list. If the UT finds that the DBS has made a mistake under s.4(2), it must either direct the DBS to remove the person from the barred list (s.4(6)(a)) or remit the matter to the DBS for a new decision (s.4(6)(b)). Section 4(7) of the Act provides that where the UT 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".

18. Lewis LJ, with whom Macur and Moylan LJJ agreed, said in *AB v DBS* [2021] EWCA Civ 1575, [2022] 1 WLR 1002, at [55], that 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", because the UT "may do the former but not the latter" when remitting. The DBS accepts (correctly) in the present case that if the UT were entitled to conclude as they did on the facts, then the direction to remove RI's name from the barred list was a permissible decision, following *AB v DBS*.

19. *R (Royal College of Nursing) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin), [2011] 1 WLR 1193 was a challenge by way of judicial review to the lawfulness of some aspects of the scheme under the 2006 Act. Wyn Williams J said:

> "During oral submissions there was some debate about the meaning to be attributed to the phrase 'a mistake . . . in any

> finding of fact' within section 4(2)(b) of the Act. I can see no reason why the subsection should be interpreted restrictively. In my judgment the Upper Tribunal has jurisdiction to investigate any arguable alleged wrong finding of fact provided the finding is material to the ultimate decision."

20. In *PF v DBS* [2020] UK UT 256 (AAC), a Presidential Panel of the UT (Administrative Appeals Chamber) chaired by Farbey J said:

> …
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> 37. Section 4(2)(b) refers to a 'mistake' in the findings of fact made by the DBS and on which the decision was based. There is no avoiding that condition. The issue at the mistake phase is defined by reference to the existence or otherwise of a mistake. If the Upper Tribunal cannot identify a mistake, section 4(5) provides that it must confirm the DBS's decision. That decision stands unless and until the tribunal has decided that there has been a mistake.
>
> 38. 'Mistake' is the word used and there is no reason to qualify it. The courts operate a test of whether a decision was 'wrong'. This has in the past been qualified by words like 'plainly'. Nowadays, that has to be understood in the way explained by the Supreme Court in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600:
>
> > 62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone 'plainly wrong', and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion.
>
> That draws attention to the need to identify an error or, in the language of section 4, a mistake. It is not enough that the Upper Tribunal would have made different findings. The word 'plainly' has not yet taken root in the Upper Tribunal's cases. The phrase was used in XY at [53], but the tribunal was merely giving a general description of the tribunal's jurisdiction on mistake of facts and not dealing with its interpretation. In order to avoid any doubt or confusion about what it means, it is better to use only the statutory language and avoid any qualifiers.
>
> 39. There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or

an omission. It may relate to anything that may properly be the subject of a finding of fact. This includes matters such as who did what, when, where and how. It includes inactions as well as actions. It also includes states of mind like intentions, motives and beliefs.

……..

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

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

43. When the Court of Appeal deals with a challenge to a judge's findings of fact on appeal, it largely limits itself to the evidence that was before the court below and only allows fresh evidence if it satisfies the conditions set out in Ladd v Marshall [1954] 1 WLR 1489… Those reasons make eminent sense in an appeal from a court or tribunal. They are not appropriate to an appeal from an administrative decision-maker and do not apply under section 4.

44. Whether or not the Upper Tribunal hears further evidence, it will have before it the reasoning of the DBS when it makes its assessment of the evidence. The respect to be shown to that reasoning was the only surviving area of disagreement by the end of the oral hearing.

…

49 …The DBS's reasoning will be before the Upper Tribunal and the tribunal will take account of it for what it is worth in the context of the evidence as a whole. At one extreme, it may be of little assistance. If the tribunal has received significant further evidence (such as oral evidence that would not have been available to the DBS), it is likely that its evaluation of the evidence that was before it will have been overtaken so that the only appropriate approach will be for the Upper Tribunal to begin afresh. At the opposite extreme, it may play a significant role. If there is no further evidence put to the Upper Tribunal, the DBS's reasoning may well form the basis of the case that the

> appellant has to meet. Between these extremes, its relevance and significance will depend on the circumstances of the case... "
>
> …

21. The DBS sought permission to appeal in *PF* but it was refused by Lewis LJ.

22. In the *JHB* case (*Disclosure and Barring Service v JHB* [2023] EWCA Civ 982) Elisabeth Laing LJ, with whom Lewison and Baker LJJ agreed, cited a number of authorities on the proper approach to be taken by appellate tribunals: *Indrakumar v SSHD* [2003] EWCA Civ 1677; *Subesh v SSHD* [2004] EWCA Civ 56; *Volpi v Volpi* [2022] EWCA Civ 464; and the judgment of Lewis LJ in *AB v DBS.* She then set out at paragraphs 85-89 of her judgment a summary of the issues and decision of the UT in *PF v DBS*. Having done so, she said at paragraphs 90-95:

> "90. On his appeal to the UT JHB did not challenge either the facts underlying the conviction or finding 1….. 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.
>
> …
>
> 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. … 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.
>
> …
>
> 95. … 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."

23. The parties' supplemental skeleton arguments were filed prior to the Court of Appeal giving judgment in *Kihembo v DBS* [2023] EWCA Civ 1547, on 21st December 2023. In a judgment with which Macur and Nugee LJJ agreed I said the following in response to submissions from Ms Patry on behalf of the DBS addressing JHB:

> "26. Ms Patry submitted that the words which I have italicised in paragraph 92 of the judgment of Elisabeth Laing LJ ["the generous ambit within which reasonable disagreement is possible"], while not departing from *PF*, "clarified it authoritatively". I agree that there is no indication in *JHB* that *PF* was in any way erroneous or that the mistake of fact jurisdiction has somehow been transformed into requiring a test of *Wednesbury* irrationality. It would be particularly inappropriate to confine it in that way when in some appeals

> from the DBS to the UT, including the present one, the UT hears oral evidence whereas the DBS does not. *PF* should in my judgment continue to be treated as good law."

Submissions

24. In her skeleton arguments on behalf of the DBS, Ms Patry KC submitted that a disagreement about the evaluation of evidence is not a "mistake of fact". If the material considered by the DBS permitted an ultimate finding on the balance of probabilities, then the DBS did not make a mistake in coming to that finding. The UT must, for this purpose, first find either that the decision of the DBS was based on a mistake of fact (based either on new evidence or on the fact that a key piece of evidence was overlooked, for example) or that the overall conclusion on the facts was irrational as being outside the generous ambit within which disagreement is possible.

25. Ms Patry submits that the fact the UT heard oral evidence from RI is irrelevant, because RI did not say or disclose anything new which undermined any finding of the DBS. The UT adopted an erroneous approach, because properly analysed, they did not find, and could not have found, that the DBS's decision that RI stole RV's money was based on a "mistake of fact", nor that this finding was not open to the DBS on the balance of probabilities. Instead, the UT adopted the impermissible approach of evaluating substantially the same evidence as the DBS, reaching a different conclusion, and therefore determining that the DBS must have made a "mistake of fact".

26. Mr Kemp and Mr Gillie, for the Respondent, submit that the UT exercised its mistake of fact jurisdiction permissibly within the parameters set down in *JHB*. In *JHB*, the court identified two categories of mistake of fact: (1) where the UT (on the same evidence) concludes the DBS's findings were irrational; and (2) where the UT considers new evidence that shows a mistake in DBS's finding of fact. The Respondent's case sits within the second category. The DBS concluded that RI stole the money based on documentary evidence that was entirely circumstantial. The UT heard a significant amount of oral evidence from RI, which was tested in cross-examination and judicial questioning. That was new evidence (not before the DBS). That evidence informed the UT's finding that RI was a credible and impressive witness. On the basis of its finding about RI's credibility, the UT concluded she had not stolen the money. This was not equivalent to merely preferring a different view of the evidence the DBS had already assessed. The facts of *JHB* can be distinguished: in that case, the UT considered essentially the same evidence as was before the DBS.

27. Following the handing down of the decision in *Kihembo* the parties in the present appeal were directed to file further short supplementary skeleton arguments to take account of that judgment. In her skeleton on behalf of the DBS Ms Patry writes:-

> "It is important to note from the outset that there is no longer any point of legal principle raised by this appeal which requires determination by this court. Permission was granted on the basis that it raised an important point of principle, but then the appeal was stood out behind the case of *DBS v JHB* which raised the same point. That case is now reported at [2023] EWHC Civ 982. The parties are in agreement as to the interpretation of the mistake of fact jurisdiction of the Tribunal set out in the

> legislation, the Tribunal's own case law and further clarified by this court in *JHB* and *Kihembo.*"

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

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

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

30. Ms Patry fastens on certain sentences in the cases of *PF* and *JHB.* In *PF,* at paragraph 38 (which I have already cited in full above), the Upper Tribunal said that "it is not enough that the Upper Tribunal would have made different findings." However, that sentence cannot be read in isolation and viewed as restricting the mistake of fact jurisdiction to cases where evidence is put before the UT which was not before the DBS. This is shown by several other observations of the Upper Tribunal in paragraphs 39, 42 and 40 of *PF,* cited above; and by their summary at paragraph 51, where they say:

> "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."* [emphasis added]

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

32. Turning to the decision of this court in *JHB,* Ms Patry prays in aid the observation in [93] that "on the authorities a disagreement in the evaluation of the evidence is not an error of fact". But that must be read in the context of the statement in the previous paragraph that it was a case where the UT was looking at "very substantially the same materials as the DBS". In contrast with the present case, JHB had given very limited oral evidence, which did not have a direct bearing on the decision to place him on the lists (see paragraph [90] of the judgment, cited above). Elisabeth Laing LJ went on to say at [95] that "a finding may also be 'wrong' for the purposes of s 4(2)(b) if it is a finding about which the UT has heard evidence that 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*."

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

evidence is given but not on matters relevant to the decision to place the appellant on one or both of the Barred Lists.

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

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

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

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

38. Ground 1 therefore fails.

Ground 2: No evidence to support the "inference" others may have stolen the money

39. Ms Patry submits that the UT's finding that "there would have been others with opportunities to steal money so that this is not a case where [RI] was necessarily the only candidate" (at [32]) amounted to an error of law. Neither party suggested that this might be what happened. The Respondent's own position was that the money had been spent by RV as he wished as previously agreed. The DBS's position was that she had stolen it.

40. This is a challenge to a factual finding of the UT dressed up as an alleged error of law. The single inference drawn by the UT at [33] would not, even if vitiated, disturb the primary finding, supported by over nine paragraphs of reasoning in the decision, that there was insufficient evidence to hold that RI stole the money.

Ground 3: Conclusions failed to take into account material considerations

41. The Appellant submits that the finding (at [36]) that "the arrangement described by [RI], whereby the sum of £100 was transferred to a cash card account and then spent by RV, has not been evidenced in documentation before us but the lack of documentation of itself does not mean that such an arrangement was not in place", demonstrates a failure to take into account material considerations. The Financial Capability Assessment required all transactions to be recorded. That document was prepared by and signed by RI and there was no evidence of an alternative arrangement having been agreed. The UT further had the dismissal letter from the employer which expressly alleged that the money was for saving and not for spending.

42. The UT's finding at [36] was that the absence of documentary evidence supporting RI's description of the arrangement (i.e. that £100 was transferred to a cash card and account and then spent by RV) did not *in itself* mean that the arrangement was non-existent. The fact that the UT did not mention in its judgment that the Financial Capability Assessment required all transactions to be recorded and was signed by RI, does not mean that this point was not considered: see *Volpi v Volpi* and the many authorities on appeals from findings of fact by trial judges. As for the dismissal letter, that was indeed put in evidence – the judgment does not suggest otherwise. The UT simply notes that there was no evidence provided by the employer "*for the purposes of these proceedings before us" r*efuting the existence of such an arrangement. Ground 3, like Ground 2, is a disguised challenge on the facts.

Conclusion

43. It is for these reasons that I joined in the decision, which we announced at the hearing, that the DBS's appeal should be dismissed. I record my particular gratitude to Mr Kemp and Mr Gillie for having represented RI *pro bono,* in the finest traditions of the Bar.

Lord Justice Males:

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

45. The approach which an appeal court will take to decisions on questions of fact made by a lower court or tribunal varies according to the nature of the appeal, the practice of the appeal court and the policy considerations which give rise to the appeal right in question. At one end of the spectrum are cases where an appeal court has no power to review findings of fact at all, however obviously wrong they may be. An example is an appeal from an arbitral tribunal under section 69 of the Arbitration Act 1996, where the appeal is limited to a question of law arising out of the award. Even though in other legal contexts it is regarded as an error of law for a court to make a finding of fact for

which there is no evidence, that is not so in arbitration cases as a result of the statutory policies of supporting arbitration, minimal court intervention, party autonomy and finality of awards (*The Baleares* [1993] 1 Lloyd's Rep 215, 228 col 1). At the other end of the spectrum, an appeal may be a complete rehearing in which the appeal court makes up its own mind on the evidence and is not in any way bound by what the first instance court has decided. An example is an appeal in a criminal case from the Magistrates' Court to the Crown Court under section 108 of the Magistrates' Court Act 1980.

46. Appeals to the Court of Appeal in civil cases occupy an intermediate position. An appeal will be allowed if the decision of the lower court is 'wrong', but in general an appeal is limited to a review of the decision of the lower court (CPR 52.21). Because the Court of Appeal does not hear evidence, and in recognition of the position of the trial judge and the needs of the efficient administration of justice in the interest of the public as a whole, the decision of the lower court on a pure question of fact will only be held to be wrong if the decision is one which no reasonable judge could have reached (e.g. *Volpi v Volpi* [2022] EWCA Civ 464 at [2], which is merely one of the latest cases to have emphasised this approach).

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

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

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

50. That conclusion is reinforced in the light of the ability of the Upper Tribunal to hear oral evidence, as occurred in the present case. Parliament must have contemplated that an appellant would be able to give evidence to the effect that 'I did not do it'; that the Upper Tribunal would be entitled to evaluate that evidence, together with all the other evidence in the case; and that if the Upper Tribunal was persuaded accordingly, the appeal would be allowed, without the Upper Tribunal needing to find any other mistake on the part of the DBS. Of course, the evidence might not be believed, but if evidence stands up well to cross examination, that must be a factor which Parliament expected and intended the Upper Tribunal to take into account. It is inconceivable that Parliament

intended to place the Upper Tribunal in a position where, having considered all the evidence and despite being satisfied that the finding of the DBS was wrong, the Upper Tribunal was powerless to allow an appeal, for want of being able to identify any other mistake made by the DBS apart from the fact that it had reached the wrong conclusion.

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

> 'There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. …'

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

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

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

matters on which the DBS relied in making findings 2 and 3, let alone any significant evidence'.

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

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

Lord Justice Lewis:

57. I agree with both judgments.