IN THE UPPER TRIBUNAL **Appeal No. V/2323/2019**
ADMINISTRATIVE APPEALS CHAMBER

ON APPEAL FROM
Appellant: **ME**
Respondent: **Disclosure and Barring Service**
DBS Ref No: **DBS6063**
Customer ref: **00907468466**
DBS ID Number: **P00018PMPYW**

Between:

ME

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Jones**
Tribunal Member Ms J Cross
Tribunal Member Dr E Stuart-Cole

Hearing date: 22 November 2021

Representation:
Appellant: In Person
Respondent: Mr Simon Lewis, Counsel instructed on behalf of the DBS

DECISION

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

The decision of the Disclosure and Barring Service to include the Appellant's name in the Children's Barred List taken on 24 July 2019 did not involve a material mistake on a point of law or finding of fact. It is confirmed.

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

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

Introduction

1. The Appellant appeals the decision of 24 July 2019 of the Respondent (the Disclosure and Barring Service or 'DBS') to include his name in the Children's Barred List ("CBL") pursuant to paragraph 2(8) of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the Act").

2. Permission to appeal was granted by an Upper Tribunal Judge on the papers on 2 June 2020 in respect of all grounds raised by the Appellant in his notice of appeal including additional grounds which the Judge considered were arguable of her own motion.

3. We held an oral hearing of the appeal in Field House, London on 22 November 2021. The Appellant was present but unrepresented giving oral evidence and making submissions. The Respondent DBS was represented by Mr Lewis of counsel. We are very grateful to both the Appellant and counsel for the presentation of their cases.

Rule 14 order - Anonymity

4. At the outset of the hearing we made an order that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify the Appellant or any person who has been involved in the circumstances giving rise to this appeal pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008. We are satisfied that the Appellant ('ME'), should not be identified, directly by name or indirectly, in this decision.
5. The Appellant's application for an order under rule 14 was not opposed by Mr Lewis for the DBS. We concluded that on balance it was just and fair to make the order sought. Even though the Appellant has a caution for the offence of possessing bestial (animal) pornographic images and videos, this did not occur in public criminal proceedings and the caution did not involve indecent images of children. A significant part of the Appellant's case in the Upper Tribunal relates to the inference that might be incorrectly drawn by the public from inclusion on the CBL, something which may attract particular public opprobrium and a risk of vigilantism.
6. We are satisfied that publication or disclosure of the Appellant's inclusion on the CBL would be likely to cause serious harm to the Appellant or his family given the nature of the allegation. There is a real possibility that his inclusion on the CBL would be wrongly interpreted as involving allegations or a finding that the Appellant was a paedophile, had been convicted of sexual offence involving children or had a sexual interest in children. Having regard to the interests of justice, we were satisfied that it is proportionate to give such a direction. Revealing to the public the nature of the allegations or that the Appellant was included on the Children's Barred list would be likely to cause the Appellant or his family serious emotional, psychological, physical (and reputational) harm.

7. We also made an order under rule 14(1)(a) that no documents or information should be disclosed in relation to these proceedings that would tend to identify the Appellant or any person who has been involved in the circumstances giving rise to this appeal. Any documents sought to be disclosed would need to be redacted for identifying information.

The Decision subject to appeal

8. On 24 July 2019 the DBS made a decision to include the Appellant on the CBL which it communicated in its Final Decision Letter. This was what is described as an 'autobar with representations' decision – see below on paragraph 2 of Schedule 3 to the Act.

9. The DBS decided the Appellant satisfied the prescribed criteria for inclusion under paragraph 2 of Schedule 3 to the Act (a conviction or caution for a qualifying criminal offence). The decision letter relied on the fact that a police caution had been issued to the Appellant on 18 December 2018 ("the Caution"). The Decision letter explained the nature of the Caution: 'You admitted to the Police that you were interested in bestiality and were subsequently found to be in possession of 41 'live movie clips' and 72 still images relating to this.'

10. There is not dispute that the Caution was, correctly, treated by the DBS as a finding of fact. There is no doubt that the Appellant received the Caution. Similarly, there is no doubt it was issued in relation to the specific offence of "possession of extreme pornographic images – of intercourse / oral sex with dead / alive animal", under section 63(7)(d) of the Criminal Justice and Immigration Act 2008.

11. The DBS stated it had "reason to believe" that the Appellant had been, or was currently, or might in the future be "engaged in regulated activity" relating to children. The DBS relied on the uncontroversial – and uncontested – fact that the Appellant had previously applied for an "Enhanced Disclosure" relating to a position of "Scout Leader/Helper" with the Scout Association. It was not in dispute in the appeal that paragraph 2(8)(b) of Schedule 3 to the Act was, therefore, satisfied. Indeed, the Appellant accepted in oral evidence during the hearing that he had previously acted as a Scout Leader for a number of years.

12. The DBS letter stated it was appropriate to bar the Appellant, despite his representations to the contrary, assessing the risk that the Appellant posed for a number of reasons:

> 'Having considered your representations, we have decided that it is appropriate to include you in the Children's barred list. <u>This is because, although in your representations you state you pose no risk to children/ accepted your wrongdoing but show no acknowledgment that accessing /viewing images of Bestiality related pornography perpetuates this form of online abuse.</u>
> <u>…</u>
>
> <u>Although you stated that you did not realise that such behaviour was illegal, the evidence suggests that in satiating your inappropriate interest / engaging in sexually deviant behaviour in this respect, you undermined the internal inhibitions that may have discouraged you from engaging in such harmful acts and legitimised the abuse.</u>

> We consider that this harm supportive thinking is transferrable to the children's sector where you could be responsible for the care/wellbeing of children and there is no evidence that you have sought to address this.
>
> We also consider it significant that the movies/images found in your possession were still 'live' and despite stating you 'probably only watched the movies/images once', you admitted that you 'kept them out of interest'. This suggest that you derived sexual gratification from viewing /downloading this material.
>
> In your representations, you focus on the impact that a bar could have on yourself and the fact that you were not to be possession of any child pornography, rather than any harm perpetuating effect that accessing/downloading bestiality could have.
>
> Furthermore, you minimise your offending behaviour when stating that you were found to be possession of a 'very small amount of Bestiality related pornography'. However as stated, you were found to be in possession of 41 'live movie clips' and 72 still images. Your lack of insight is further referenced by your comment that 'beyond the Police caution, my punishment continues.'
>
> In mitigation we recognise that the Police referred to your previously good character and there is no evidence that you have directly harmed a child.
>
> We acknowledge that Article 8 of the European Convention of Human Rights is engaged in this case as including you in the Children's barred List would bar you from a range of employment and could constitute an interference in your right to a private life. To this end, we note in your representations, your fear that should your inclusion on the Children's Barred List [be] disclosed, you would be classed as a 'Paedophile' and would not want to put your family through this.
> …..
>
> Furthermore you advised the police that you were employed as a lecturer in Electronic Engineering and there is no evidence to conclude that you have been financially dependent on a career in regulated activity.
>
> In conclusion, you admitted that you accessed/downloaded movies/images of Bestiality as you were interest in this. In doing so, you perpetuated / legitimised this form of online sexual abuse and the fact that you retained the movies/ images indicates that it is likely that you derived sexual gratification from these. You show no insight as to how your actions are harmful/ your representations focus on the impact that your offending behaviour has had/could have on yourself. We also consider that your faulty/harm supportive thinking is transferrable to the children's sector where you would be responsible for their care/wellbeing. The evidence suggest therefore, that including you in the Children's Barred list strikes a fair balance between your rights and the needs of the community.'
>
> [*Emphasis Added*]

13. It is important to emphasise that in making their decision the DBS do not and did not suggest, allege or find that the Appellant has any sexual interest in children and there is no reliable evidence from which such an interest could be inferred. The Appellant has never been prosecuted or convicted for any offence relating to

a sexual interest in children whether it be viewing child pornography or indecently touching or assaulting a child. That is not the way in which the DBS defend their decision and there is no evidential basis for such an argument.

Appellant's Representations

14. Prior to the DBS's Final Decision of 24 July 2019, the Appellant had been invited to provide representations. The onus, in general, was on him to obtain and provide any information or evidence to support his representations. He provided two sets of representations ("the Representations"). The first (undated) was very brief. The Appellant stated (among other things) that:

    (a) he committed the offence in "ignorance" of the law;

    (b) the offending conduct was "very limited" in scope;

    (c) he would not be applying for any jobs for which the prospective employer might ask for a DBS check;

    (d) there was a "huge difference" between his particular offence and "stigma attached to being a paedophile" and, further, he thought that being included in the CBL would be perceived to be associated with the latter; and

    (e) he had a "fear" that a decision to include him in the CBL could become "public knowledge" and that there would be a destructive "backlash" against him and his family.

15. In a second set of Representations, dated 27 June 2019, the Appellant stated (among other things and as far as is relevant to the Decision) that:

    (a) 2018 was a "very difficult" year for him and his family, but the latter retained faith in him;

    (b) he had admitted the possession of "bestiality related pornography" (and had accepted the Caution) but "as the [police] report states" there was a "very small" amount of it;

    (c) he had lost his employment, as a lecturer at a university, following an allegation [subsequently not pursued and, importantly, not relied upon in the Decision] of a separate offence – relating to "child pornography" – which he did not commit;

    (d) there is "no evidence" that he is/was a "danger to children";

    (e) being placed in the CBL would be punitive in light of the existence already of the Caution;

(f) his "fear" remained that being placed in the CBL would be "disclosed at some point" – adding that he had little confidence in data security issues – leaving him to be "tarred with the reputation of being a paedophile"; and

(g) he wanted to try to "get back to normality".

Appellant's Grounds of Appeal

16. In his Grounds of Appeal (his "Reasons for Appealing" document) enclosed with his notice of appeal dated 16 October 2019, the Appellant focused on the following points (labelled and numbered below as "Grounds"):

(a) The DBS was wrong to rely on a finding that he lacked insight **("Ground 1")**;

(b) The DBS was wrong to rely on a finding that "there is no evidence to conclude that you have been financially dependent on a career in regulated activity" **("Ground 2")**;

(c) The DBS was wrong to rely on a finding that his "retention" of the offending files "suggests on-going access to them" **("Ground 3")**;

(d) The DBS was wrong to infer or rely on a finding that he "derived sexual gratification from viewing the material" **("Ground 4")**;

(e) The DBS was wrong to rely on a finding that he had "minimised" his offending behaviour in relation to the number of files found and, thereby, lacked any real "insight" **("Ground 5")**; and

(f) The "interest" cited in the "DBS statement derived from looking into the "myths of the death of Katherine the Great", as he had explained to the police. While the Appellant admitted that his interest "clearly went too far", he asserts it "was long ago" and that there is "no evidence" that he harboured/harbours "harm supportive thinking" **("Ground 6")**.

Additional grounds on which the UT granted permission to appeal

17. At the same time as granting the Appellant permission to appeal to the UT on 2 June 2020, the Judge made various observations and raised further grounds of appeal ("the Observations"). For completeness and convenience, these are summarised below and labelled and numbered as additional grounds:

(a) in the "absence of evidence that those engaged in the pornographic images were coerced or harmed, it is difficult to see

how [the Appellant's] behaviour 'encouraged harm supportive thinking'" (paragraph 3 of the Observations) ("Ground 7");

(b) it "seems to me that [the DBS] has not supplied evidence that arguably begins to show that [the Appellant's] predilections might be transferred to children because his inhibitions were loosened" (paragraph 4) ("Ground 8"); and

(c) [the DBS]'s decision to bar "arguably fails to give any adequate explanation of the proportionality of this decision and appears to be based on [the Appellant's] unconventionality" (paragraph 5) ("Ground 9").

Law

The lists and listing under the 2006 Act

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

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

> '2(1) DBS must establish and maintain—
>
> (a) the children's barred list;
>
> (b) the adults' barred list.
>
> (2) Part 1 of Schedule 3 applies for the purpose of determining whether an individual is included in the children's barred list.
>
> (3) Part 2 of that Schedule applies for the purpose of determining whether an individual is included in the adults' barred list.
>
> (4) Part 3 of that Schedule contains supplementary provision.
>
> (5) In respect of an individual who is included in a barred list, DBS must keep other information of such description as is prescribed.'

Children's barred list

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

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

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

23. The relevant provisions (paragraph 2(8)) of Part 1 of Schedule 3 to the Act, on inclusion on the children's barred list following 'autobar with representations', provide as follows:

2(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.
(2) Sub-paragraph (4) applies if it appears to DBS that—
(a) this paragraph applies to a person, and
(b) the person is or has been, or might in future be, engaged in regulated activity relating to children.
(4) [DBS] must give the person the opportunity to make representations as to why the person should not be included in the children's barred list.
(5) ……
(7) Sub-paragraph (8) applies if the person makes representations before the end of any time prescribed for the purpose.
(8) If [DBS]—
(a) is satisfied that this paragraph applies to the person,
(b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
(c) is satisfied that it is appropriate to include the person in the children's barred list, it must include the person in the list.

24. There is no dispute that the Appellant falls within the prescribed criteria under the Regulations for the purposes of paragraph 2(1) & (8)(a) of the Act.

25. The first relevant provision is Regulation 4(5) Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009/37 (which has the sub-title: "Prescribed criteria — automatic inclusion in the children's barred list with the right to make representations"). Either a "conviction" or a "caution" is sufficient for this regulation to be engaged and there is express reference to "the Schedule" (and specifically to paragraph 2 of the Schedule).

26. Paragraph 2 of the Schedule (as amended) to the above regulations, specifically paragraph 2(f), is the relevant provision (i.e. the reference to "any offence contrary to a provision specified in Part 2 of that table").Within Part 2 of the table in the Schedule (as amended) is an express reference to: "Criminal Justice and Immigration Act 2008, section 63". As explained in the notes (at note 32), the same was "inserted by Safeguarding Vulnerable Groups Act 2006 (Controlled Activity and Prescribed Criteria) Regulations 2012/2160 reg.3(5)(b) (September 10, 2012)".

27. Section 63 of the Justice and Immigration Act 2008 (most specifically, section 63(7)(d)) is the offence for which the Appellant received the Caution.

28. There is no dispute that the Appellant satisfies paragraph 2(8)(b) of Schedule 3 to the Act given that he has been previously engaged in regulated activity relating to children through his work for the Scout movement.

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

> a) is satisfied that this paragraph applies to the person,
> b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and [so long as the person has made representations regarding their inclusion]
> c) is satisfied that it is appropriate to include the person in the children's barred list, it must include the person in the list.

30. In contrast, this appeal does not concerns the third category ('discretionary barring') where a person does not meet the prescribed criteria (has not been convicted of specified criminal offences nor made subject to specified orders as set out within the Regulations and the Schedule thereto), and therefore paragraphs 3 of Schedule 3 to the Act apply. Under paragraph 3(3) of Schedule 3 the DBS must include the person in the children's barred list if:
> (a) it is satisfied that the person has engaged in relevant conduct, and
> (aa) it has reason to believe that the person is or has been or might in future be, engaged in regulated activity relating to children, and
> (b) it is satisfied that it is appropriate to include the person in the list.

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

32. As the Caution was treated as a finding of fact, there was/is no requirement for the DBS to establish "relevant conduct" or "risk of harm" in this case (i.e. in an "autobar with representations" case), in the way the DBS is required to do (pursuant to paragraphs 3-5 of Schedule 3 to the Act) under the alternative "discretionary" barring process.

33. Under paragraph 2 of Schedule 3 to the Act, given the specific offence to which the Caution related, the DBS was required to (i.e. it "must") include the Appellant in the CBL if it was "satisfied" that it was "appropriate" to do so, following consideration of any representations why inclusion would not be appropriate.

34. The only issue in this appeal therefore is whether there was a mistake of law or fact in including the Appellant on the CBL on the basis it was appropriate for the purposes of paragraph 2(8)(c) of Schedule 3 to the Act.

The Right of Appeal and jurisdiction of the Upper Tribunal

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

'4(1) An individual who is included in a barred list may appeal to the [Upper] Tribunal against—
(a) . . .
(b) a decision under paragraph [2,] 3, 5, [8,] 9 or 11 of [Schedule 3] to include him in the list;
(c) a decision under paragraph 17[, 18 or 18A] of that Schedule not to remove him from the list.

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

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

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

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

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

(6) If the Upper Tribunal finds that DBS has made such a mistake it must—
(a) direct DBS to remove the person from the list, or

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

(7) If the Upper Tribunal remits a matter to [the DBS] under subsection (6)(b)—
(a) the Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and
(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.'

[Emphasis added]

36. Thus section 4(2) of the Act provides that a person included in (or not removed from) either barred list may appeal to the Upper Tribunal on the grounds that the DBS has made a mistake of law (including the making of an irrational or disproportionate decision) or a mistake of fact on which the decision was based. Although not provided for by statute, the common law requires that any mistake of fact or law, normally referred to as 'errors', must be material to the ultimate decision

ie. that they may have changed the outcome of the decision – see [102] of the *RCN* judgment set out below.

37. It is important to emphasise that an appeal to the Upper Tribunal can only succeed if the DBS *erred in law or fact* **–** see section 4(5).

Mistake or error of fact

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

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

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

41. However, the Upper Tribunal may make its own fresh findings of fact having heard all potentially relevant evidence during the appeal process by which it may judge whether the DBS made a mistake of fact in making its decision.

42. The extent of the jurisdiction for the Upper Tribunal to make findings of fact was considered in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC) at [51]:

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

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

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

Appropriateness

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

44. Under section 4(3) of the Act, the decision whether or not it is "appropriate" for an individual to be included in a barred list is "not a question of law or fact". Section 4(3) of the Act provides that the appropriateness of a person's inclusion on either barred list is not a question of law or fact. Unless the DBS has made a material error of law or fact the Upper Tribunal may not interfere with the decision - *R v (Royal College of Nursing and Others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin) ('*RCN*') at [102]-[104]:

> 102. During oral submissions there was some debate about the meaning to be attributed to the phrase "a mistake ….in any finding of fact within section 4(2)(b) of the Act". I can see no reason why the sub-section should be interpreted restrictively. In my judgment the Upper Tribunal has jurisdiction to investigate any arguable alleged wrong finding of fact provided the finding is material to the ultimate decision.
>
> 103. In light of the fact that the Upper Tribunal can put right any errors of law and any material errors of fact and, further, can do so at an oral hearing if that is necessary for the fair and just disposition of the appeal I have reached the conclusion that the absence of a right to an oral hearing before the Interested Party and the absence of a full merits based appeal to the Upper Tribunal does not infringe Article 6 EHCR. To repeat, an oral hearing before the Interested Party is permissible under the statutory scheme and there is no reason to suppose that in an appropriate case the Interested Party would not hold such a hearing as Ms Hunter asserts would be the case. I do not accept that this possibility is illusory as suggested on behalf of the Claimants. Indeed, a failure or refusal to conduct an oral hearing in circumstances which would allow of an argument that the failure or refusal was unreasonable or irrational would itself raise the prospect of an appeal to the Upper Tribunal on a point of law. Further, any other error of law and relevant errors of fact made by the Interested Party can be put right on an appeal which, itself, may be conducted by way of oral hearing in an appropriate case.
>
> 104. I am more troubled by the absence of a full merits based appeal but I am persuaded that its absence does not render the scheme as a whole in breach of Article

> 6 for the following reasons. First, the Interested Party is a body which is independent of the executive agencies which will have referred individuals for inclusion/possible inclusion upon the barred lists. It is an expert body consisting of a board of individuals appointed under regulations governing public appointments and a team of highly-trained case workers. Paragraph 1(2)(b) of Schedule 1 to the 2006 Act specifies that the chairman and members "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults." The Interested Party is in the best position to make a reasoned judgment as to when it is appropriate to include an individual's name on a barred list or remove an individual from the barred list. In the absence of an error of law or fact it is difficult to envisage a situation in which an appeal against the judgment of the Interested Party would have any realistic prospect of success. Second, if the Interested Party reached a decision that it was appropriate for an individual to be included in a barred list or appropriate to refuse to remove an individual from a barred list yet that conclusion was unreasonable or irrational that would constitute an error of law. I do not read section 4(3) of the Act as precluding a challenge to the ultimate decision on grounds that a decision to include an individual upon a barred list or to refuse to remove him from a list was unreasonable or irrational or, as Mr. Grodzinski submits, disproportionate. In my judgment all that section 4(3) precludes is an appeal against the ultimate decision when that decision is not flawed by any error of law or fact.

45. In *DBS v AB [2021] EWCA Civ 1575*, the Court of Appeal explained the nature of the Upper Tribunal's jurisdiction at [67]-[68]:

> 67. The context, and the nature of the statutory scheme, is that it creates a system for the protection of children and vulnerable adults. It provides for an independent body, the DBS, to determine whether specified criteria are met and, in the case of paragraph 3 of Schedule 3 to the Act, that it is appropriate to include a person's name in the children's barred list or the adults' barred list. There is a safeguard for individuals in that they may appeal to the Upper Tribunal on the basis that the DBS has made an error of law or fact. The Upper Tribunal cannot consider the appropriateness of the decision to include or retain the person's name in a barred list when deciding if the DBS had made such an error. If the DBS has not made an error of law or fact, the Upper Tribunal must confirm the decision of the DBS (section 4(5) of the Act). Only if the DBS has made an error of law or fact, can the Upper Tribunal determine whether to remit or direct removal of the person's name from the list (section 4(6) of the Act).
>
> 68. The scheme as a whole appears, therefore, to contemplate that the DBS is the body charged with decisions on the appropriateness of inclusion of a person within a barred list. The power in section 4(6) of the Act needs to be read in that context. The context would not readily indicate that the Upper Tribunal is intended to be free to decide for itself questions concerning the appropriateness of inclusion of a person in a barred list. It is unlikely, therefore, that section 4(6) of the Act was intended to give the Upper Tribunal the power to direct removal because it, the Upper Tribunal, thinks inclusion on the list is no longer appropriate. It is more consistent with the statutory scheme that the power is to be exercised when the only decision that the DBS could lawfully make would be to remove the person from the barred list.

Mistake or error of law

46. A mistake or error of law includes instances where the DBS have got the particular legal test or tests wrong (applied or interpreted the law incorrectly), or failed to consider all the relevant evidence or made a perverse, unreasonable or irrational finding of fact, or failed to explain the decision properly by giving sufficient or

accurate reasons, or breached the rules of natural justice by failing to provide a fair procedure.

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

Proportionality

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

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

> 16. The ISA is an independent statutory body charged with the primary decision making tasks as to whether an individual should be listed or not. Listing is plainly a matter which may engage Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Article 8 provides a qualified right which will require, among other things, consideration of whether listing is "necessary in a democratic society" or, in other words, proportionate. In *R (Quila) v Secretary of State for the Home Department* [2011] 3 WLR 836, Lord Wilson summarised the approach to proportionality in such a context which had been expounded by Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 (at paragraph 19). Lord Wilson said (at paragraph 45) that:
>
> > "… in such a context four questions generally arise, namely: (a) is the legislative object sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?"
>
> There, as here, the main focus is on questions (c) and (d). In *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 Lord Bingham explained the difference between such a proportionality exercise and traditional judicial review in the following passage (at paragraph 30):
>
> > "There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test … The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time … Proportionality must be judged objectively by the court …"

17. All that is now well established. The next question – and the one upon which Ms Lieven focuses – is how the court, or in this case the UT, should approach the decision of the primary decision-maker, in this case the ISA. Whilst it is apparent from authorities such as *Huang* and *Quila* that it is wrong to approach the decision in question with "deference", the requisite approach requires

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

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

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

Lady Hale added (at paragraph 37):

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

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

…….

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

50. In summary, questions of proportionality should be examined applying the tests laid down by Lord Wilson in *R (Aguilar Quila) v Secretary of Stage for the Home Department* [2012] 1 AC 621 at para 45:

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

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

Burden and Standard of proof

52. The burden of proof is upon the DBS to establish the facts and relevant conduct upon which it relies. The standard of proof to which the DBS and the Upper Tribunal must make findings of fact is on the balance of probabilities, ie. what is more likely than not. This is a lower threshold than the standard of proof in criminal proceedings (being satisfied so that one is sure or beyond reasonable doubt).

The Appellant's evidence and submissions

53. The Appellant gave oral evidence at the hearing before us on 22 November 2021 and was cross examined by Mr Lewis. In short, he relied on his written grounds of appeal.

54. His oral statements consisted partly of legal submissions and partly of evidence of fact. In so far as he gave evidence of fact, we should state at the outset that we did not find significant parts of the Appellant's evidence to be reliable and reject his evidence on those issues for the reasons set out below. We record the Appellant's submissions and make the following findings of fact in respect of the evidence on the balance of probabilities.

55. The Appellant stated that he was not proud of himself and fully supported the work of DBS who performed an important job. He wished to focus his appeal on the proportionality of the decision although he also submitted some grounds where he considered that the DBS fact finding was incorrect.

56. The Appellant stated that the DBS were basing their case on the police records and police interview for the caution he received and that was not the purpose for which they were prepared. The police evidence was not prepared for child protection issues and contained a lot of speculation. For example, he submitted that downloading as opposed to streaming online material is expensive – IT professionals do not delete material. Therefore, he did not make a conscious decision to delete the material but had he known it was illegal to hold the material it would have been deleted.

57. We make no finding as to whether the Appellant knew it was illegal to download, access, view or save the material at the time because ignorance as to whether the actions constituted a criminal offence does not constitute any defence to the offence.

58. On the issue of harm caused by the images and videos he submitted that the sexual exploitation for animals was no more harmful as opposed to breeding and eating purposes – the animal cannot give consent. We make various findings below in respect of the Appellant's lack of understanding or insight as to the harm caused to human participants by the creation of the images / videos and to those viewing the material.

59. The Appellant stated that he had been a university lecturer at the relevant time and worked at other things as well. He had been freelance since 2001 and involved with computers all his life – he was still doing that work and there was no reason to disclose it during his initial representations.

60. The Appellant was concerned by being barred from regulated activity because he remains the website host of many websites (including for a long list of domain names he provided to us in hard copy). This included being a moderator of some forums which may be aimed at or accessed by children. He stated he might inadvertently be placed in real trouble by the barring without knowing about it. He looked after the web domains, having day to day responsibility for some but for others he would hand over to a client and they would do the running of the website. Yet all the same, he would have responsibility in law for all the webs domains.

61. The Appellant was concerned that he would still have access to and control all their data of domains that he would not be responsible for running on a day to day basis even if he was responsible for in law. He had discovered that he may technically qualify as a moderator of a forum – although there is no definition of moderator or forum – and this may constitute participating in regulated activity. However, he would not know if one of his clients' websites was aimed at children. For instance, he had set up website for lost toys which was not aimed at children but adults and children could use and worried that may qualify as a moderator of a forum (and hence regulated activity).

62. He stated he was still 'sick to my stomach' about his original arrest by police and although what he did was wrong, he considered he was still being disproportionately punished three years on and the police caution was still hanging over him. The effect of the arrest was disproportionate because - despite the fact there was no evidence for him having any sexual interest in children and he was not prosecuted for uploading child pornography, he told the head of school at the University at which he was working of his arrest. Human Resources immediately suspended him and he subsequently resigned his employment.

63. He also submitted that his main argument on proportionality was that his inclusion on the children's barred list is for ever or can only be reviewed after 10 years – the minimum barring period. In contrast, he submitted that his police caution can become spent or removed (under the Rehabilitation of Offenders Act) after 6 years.

64. As for the impact of being barred from working in regulated activity, a large part of his income is from investments and only 25% is from freelancing software engineering and electronics. Of the software engineering the website hosting accounts for half of his IT work or 1/8th of his overall income. His income from the computer services business was about £21,000 in his last accounts whereas he receives about £72,000 from investments. The Appellant accepted that he had no mortgage and owns his own property, a 5 bedroom detached house in the South East of England.

65. The Appellant denied any harm supporting thinking and stated that his downloading, viewing and saving the images / videos was not sexually motivated and he derived no sexual gratification from them. He accepts he went 'too far' but that he was only researching a historical interest in the activities of Katherine the Great and came across the material accidentally. He suggested he did not know the nature of the material until he viewed it and thereafter it was automatically saved when downloaded.

66. We reject his evidence on this point as being unreliable. We are satisfied that his downloading, viewing and saving the material was sexually motivated or at least that he derived sexual gratification from viewing images / videos for the following reasons:

    a) The Appellant admits he went too far and it was inappropriate viewing – this is inconsistent with an explanation that his was historical research / accident. Whether or not he was aware when accessing, downloading, viewing and storing the bestial images that it constituted a criminal offence is irrelevant and the DBS did not rely on the Appellant being aware of this – ignorance is no excuse. It remained a criminal offence to download and view the material;
    b) In his police interview to the DBS, as opposed to his early representations and appeal grounds, he never suggested that historical research / accident was his explanation nor did he rely upon a wholly innocent account. The appeal grounds and oral evidence were a late and inconsistent explanation for accessing the material;
    c) The significant number of images and videos suggest that they were not viewed by accident;
    d) The images / videos were saved and not deleted from his computer (even if we were to accept the Appellant's somewhat unlikely explanation that when they were downloaded, they were automatically saved and were not stored in a password protected part of his computer);
    e) The fact that the Appellant tried to legitimise and justify the creation of the criminal images / videos as no more or even less harmful to animals than eating meat and that it might not be harmful to humans (because the women may have consented to take part in the acts captured in the images and videos). He therefore lacked any insight into the potential sexual, emotional, psychological or physical harm that may have been caused to the women participating in the images / videos even if they had not been coerced into and consented to performing these acts. He also lacked any insight into the potential emotional, psychological or sexual harm that it may cause to the viewer of this material in forming their attitude to acceptable sexual activity with women as opposed to

abuse and legitimising the degradation of the women. We are satisfied that his evidence demonstrated harm supportive thinking.

Discussion and Decision

67. We have made some findings of fact as set out above but make further findings below. In light of these, we are satisfied that the DBS made no mistakes of fact or law in its Final Decision letter and reject each ground of appeal for the reasons set out below.

Ground 1

68. Starting with Ground 1, we are satisfied that the DBS did not make a material mistake of fact in finding that the Appellant not provided sufficient evidence of – and in fact lacked sufficient – insight into his conduct and behaviour:

    (a) in his representations, the Appellant focused on: (i) things that he thought minimised the seriousness of the offence (e.g. the absence of any indecent images of children, the marked difference between such offending and his in relation to bestiality, the "very small" quantity relevant pornography found in his possession, his ignorance of the law); and (ii) difficulties that the wider situation had had, or would go on to have, on him or his family (e.g. the unfairness and impact of his earlier loss of employment in relation to a separate allegation, the stigma attached to be being identified as someone on the CBL);

    (b) in his representations, the Appellant did not indicate or provide any significant evidence that he had any, or any adequate, insight into the harm that accessing and viewing extreme and criminal pornography perpetuates to the viewer or the actors therein. Nor was there any evidence of any attempt or commitment to resolving any underlying issues (counselling, etc) as remediation.

    (c) The Appellant further demonstrated to us in his oral evidence a significant lack of insight into the potential harm caused to the women in the images/videos and the viewers of the material for the reasons we have set out above.

Ground 2

69. We reject Ground 2 as not demonstrating any mistake of fact or law in the DBS decision:

    (a) in the Decision, the DBS stated that "there is no evidence to conclude that you have been financially dependent on a career in regulated activity". We are satisfied that this finding did not involve any mistake of fact. There was no such evidence before the DBS

at the time. No such evidence has been provided before or after the decision. In any event, we are not satisfied that the same would amount to a material mistake: we are satisfied that the overall outcome of inclusion in the barring list would have been the same in any event;

(b) The Appellant also stated – albeit only in his Grounds of Appeal – that: (i) his income is now based on work as a freelance programmer and web host, being responsible for around 178 web domains; (ii) such a line of work will or may be adversely affected by the Decision; (iii) there is a risk he might (inadvertently) break the law by working for clients whose websites could be considered sufficiently related to children to be caught by the concept of regulated activity; and (iv) in such circumstances, he would have to give up such work, significantly reducing (he asserted) his ability to financially support himself;

(c) the point at (b) above about the Appellant's new role, however, does not amount to "evidence that he is [or, more relevantly, *was* at the time of the Decision] financially dependent on a career in regulated activity". The Appellant has relied on conjecture. He has provided no evidence in support. It cannot be for the DBS to speculate on whether certain hypothetical situations may or may not arise and, if they were to, the adverse impact of the same.

70. The Appellant has not established that he was (or is) financially dependent on a career in regulated activity. Indeed, in his oral evidence to us during the hearing he confirmed that most of his income was from investments and pensions and only a quarter of it came from website hosting. Of that work, he accepted that he was conducting for free all the website hosting which might involve children that he was concerned may no longer be available to him if it was considered to be regulated activity. There was no mistake of fact, whether material or not in deciding that he was not financially dependent on regulated activity.

Ground 3

71. In respect of Ground 3, we find no mistake of fact or law in the DBS's decision. The relevant parts of the decision appear to be the parts which stated:

"We also consider it significant that the movies/images found in your possession were still 'live' and despite saying that you 'probably only watched the movies/images once', you admitted that you 'kept them out of interest'. This suggests that you derived sexual gratification from viewing/downloading this material"; and
(ii) "In doing so, you perpetuated/legitimised this form of online sexual abuse and the fact that you retained the movies/images indicates that it is likely that you derived sexual gratification from these."

72. For the reasons we have set out above, we have found that the Appellant was attempting to legitimise criminal sexual activity and derived sexual gratification from the images / videos. We find it likely that the reason the Appellant would download and then save such material, was with an intention at the time to preserve the opportunity to be able to "access" them again in the future.

73. In any event: even if the Appellant had, in fact, stored and retained the material while having no sexual interest in such things and/or without in fact going back to view them again, the same would not amount to a material mistake. The outcome would have been the same: the offence was still committed; the harm had still been perpetuated; the insight was still lacking; it would still have been reasonably appropriate for the DBS to bar ME from working with children.

Ground 4

74. In respect of Ground 4, the Decision stated: "the fact that you retained the movies/images, indicates that it is likely that you derive sexual gratification from these". We have given a number of reasons above for deciding that the DBS was not mistaken in making this finding. There are further reasons for this:

    (a) it would be reasonable for the DBS to work from a starting point that sexual gratification is inherently linked to pornography, of any particular flavour;

    (b) moreover, in this regard, the UT notes the express reference within section 63(3) of the 2008 Act to pornographic material being material of a nature which must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal. The Caution was given and the Caution was "accepted" by the Appellant;

    (c) there was no express denial of sexual interest in the Representations;

    (d) there was some reference within the Representations to an alleged historical interest – albeit in an under-developed and unevidenced way – in the "myths of the death of Katherine the Great". Even then, the Appellant stated that any such interest "clearly went too far". Any genuine interest in such "myths" is not, in any event, mutually exclusive with a sexual interest in the images, and does not justify the offence committed;

    (e) the evidence clearly indicates that the Appellant was an IT-literate individual (noting the nature of his current/former work), who made a deliberate decision to look for, download and save in a folder the relevant material;

    (f) we note that the Decision referred to it being "likely" that the Appellant "derived" sexual gratification from the relevant files

(not, strictly, that he continued, at the time of the Decision, to do so).

75. Regarding Ground 6: the above points are repeated. There was no material mistake of fact.

Ground 5

76. In respect of Ground 5, we are satisfied that the DBS did not make a material mistake of fact in relation to its statement in the Final Decision, that "you minimise your offending" when stating the Appellant was only found to be in possession of a "very small amount" of the extreme pornography:

    (a) first, there is no, or no sufficient, merit in a submission by the Appellant that he merely adopted a phrase used in the police report. The police report did not, as a fact, refer to a "very small" amount; it referred, only, to a "small" amount. The Appellant added a significant qualifying word: "very";

    (b) second, in any event, what the police might consider to be "small" does not bind the DBS or fetter its discretion. The DBS must and did apply its own judgment, given its own particular statutory purpose. It is axiomatic that the police and DBS have a different purpose and are involved in different environments. It may well be that, given the particular frame of reference of that particular police officer (or, indeed, of the police more generally) that the quantity of materials possessed by the Appellant was relatively small, in their experience. But the DBS was entitled to take the view: 41 movies and 72 images was not, and is not, a "very small" amount. It was at least a significant, amount. It is not, by contrast, the kind of very small amount (one, two or three files, or similar, for example) which might credibly, for instance, be accidentally downloaded or unknowingly received; and

    (c) third, referring to the amount as "very small" *was* one way (among others, such as the absence of more serious offending, relating to indecent images of children or paedophilia generally) in which the Appellant sought to minimise the seriousness of his offence: that was and remains correct, as a fact.

Ground 7

77. This ground is assumed to relate to the possibility that the DBS made a "mistake of fact" (on the basis that there was/is no obligation on them to establish "relevant conduct" or "risk of harm" in this type of case).

78. The relevant images and videos related to intercourse or oral sex between humans and animals. Possession of the same has been made illegal and criminal by Parliament. It is inherent within the same that such offending supports harm, in a general sense.

79. It cannot be said that the animals, involved in the relevant files, consented. It is, surely, not possible for such an animal – whether a horse, a dog, a snake, etc – to give valid consent (in a similar way that a heavily intoxicated person could not, or a child of a certain age could not). In this sense, harm is unarguably done, by such activities, in relation to the animals. It cannot be seen as anything other than abuse and exploitation of those animals.

80. Far more importantly, the DBS was right to concentrate on the harm to humans caused by creating or viewing the material and the risk that a viewer might pose when caring for or supervising children.

81. The DBS did not base their decision on whether the women engaging in the sexual acts, captured in the files, "consented or were coerced". The DBS does not have needed (or needs now) to prove the women did not consent or were coerced. It would not be practical to do so. Reasonable inferences can be drawn that irrespective of whether the women consented or were coerced (such as through modern slavery), participation would be likely to cause some form of physical, sexual, emotional or psychological harm to the women and viewing the material may give rise to these types of harm to the viewer. Further, participating in or viewing such material constitutes a criminal offence because Parliament has decided that it should be prohibited.

82. Harm caused by the relevant material, whether to those involved in the sexual acts or to others who might be exposed to the images and videos, is perpetuated by the viewing and downloading of them. The Appellant contributed – albeit not directly – to the harm. We also note the references, within the Decision, to *perpetuating* a form of online "abuse". We take the view that such a contention may apply, by analogy, to offences relating to the possession of bestial images as it would to indecent images of children or other prohibited images.

83. We are satisfied that there was no material mistake of fact in relation to this ground.

Ground 8

84. We reject Ground 8 as not demonstrating any mistake of fact or law in the DBS's decision:

    (a) We do not accept that the DBS had/has an obligation, within the statutory framework, to supply "evidence" in general or more specifically to "show that [the Appellant's] predilections might be transferred to children because his inhibitions were loosened". The DBS had sufficient information on which to make the decision it was required, under statute, to make;

    (b) this is a ground that, if relevant at all, goes to the DBS's decision on whether it was "appropriate" to bar ME. That decision was not irrational, taking into account the existence of the Caution and

particulars of the offence, the position of trust that people working in regulated activity with children are placed in to, the high public interest in safeguarding children, and the importance of maintaining public confidence; and

(c) there was a sufficient "nexus" between the Caution/offence and any inherent risks working with children.

85. The DBS came to a judgment and made a risk assessment, as it is required to do as the expert body appointed by Parliament, that the Caution and the conduct that led to it was such that, in all the circumstances, made it "appropriate" to include the Appellant in the CBL.

86. This is not arguable as an error of fact in the light of section 4(3) of the Act and the recent judgment of the Court of Appeal in *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575 ('AB'), in particular para.55:

> 55. The Upper Tribunal also made findings of fact and made comments on other matters. Section 4(7) of the Act provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made (on which DBS must base its new decision)". It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind. First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually-supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact. Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, Upper Tribunal would have to have sufficient evidence to find a fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.

87. For the reasons we have set out above, there was a rational basis, supported by evidence and adequately explained, for the DBS's assessment that the Appellant does pose a material risk to the safety of children, by his reduced ability to recognise harm and there is a risk he may be impaired in his ability to protect children from harm (whether online or in person and whether it be physical, emotional, psychological or sexual). Therefore, the Ground does not constitute an error of law but is, in our judgment, an attempt indirectly to invite the Upper Tribunal to consider the appropriateness of barring, which is prohibited by s.4(3) of the 2006 Act.

88. The decision in relation to "appropriateness" and the transferability of the Appellant's mindset cannot be challenged before the Upper Tribunal, albeit that Mr Lewis did concede the Upper Tribunal could decide whether the risk /assessment might be capable of challenge either as being irrational or disproportionate.

89. In any event, we are satisfied that the risk assessment was both rational and proportionate. It was guided by the nature of the offence, the lack of any insight and attempt to legitimise the conduct, the high public interest in safeguarding children, the need to maintain public confidence, and the content of (i.e. the lack of persuasive power, and/or the lack of supporting evidence, in) the Appellant's representations.

90. We return to the appropriateness of the decision and in a separate section below but before leaving this topic also note that the Barring Decision Process papers stated 'No risk assessment has been completed in this case of the following reasons' as part of the Structured Judgement Process. However we are satisfied that this does not give rise to any error and DBS followed its only guidance on circumstances where there is no need to conduct a risk assessment (where the DBS has addressed all the representations - and no further evidence has been presented to require it to conduct one). This is explained in the DBS's own internal guidance:

> **'Autobar stage three: Structured Judgement Process (SJP) risk assessment tool**
>
> The starting point of an autobar with representations case is that the individual has been cautioned or convicted of a relevant offence, which implies a risk to a vulnerable groups. Therefore, the SJP will not be necessary in all cases. However, where there is sufficient information (including representations), the SJP may be used to assist the DBS to determine risk factors.'

91. Therefore, the lack of SJP risk assessment was not unlawful – see *PP v Disclosure and Barring Service* [2017] UKUT 337 (AAC) – there was no legitimate expectation that one would be performed. The fact that the DBS did not conduct a formal SJP risk assessment, does not mean it did not address the risk the Appellant posed when addressing his representations. The DBS was entitled to adopt the approach it did using the Caution as a starting point.

Appropriateness

92. As we have set out above and in relation to ground 8, section 4(3) of the Act limits the jurisdiction of the UT to consider the "appropriateness" of including an individual on one of the barred lists. However the DBS did concede that its decision on appropriateness (and any risk of harm an Appellant is said to pose) may be challenged as a mistake of law if the high hurdle of disproportionality/ irrationality and/or perversity, in particular, is a made out. However, as the decisions of the Court of Appeal in B and AB emphasise, the UT cannot merely substitute its own view as to what decision or process ought to have been taken or followed.

93. We are satisfied that the DBS' reasons were rational and therefore lawful for deciding in light of his Caution that it was appropriate to include the Appellant on the CBL and that the Appellant posed a risk of harm to harm to children (whether physical, psychological, emotional or sexual). The following reasons from within its decision were most material:

> 'This is because, although in your representations you state you pose no risk to children/ accepted your wrongdoing but show no acknowledgment that accessing /viewing images of Bestiality related pornography perpetuates this form of online abuse.
> …
>
> Although you stated that you did not realise that such behaviour was illegal, the evidence suggests that in satiating your inappropriate interest / engaging in sexually deviant behaviour in this respect, you undermined the internal inhibitions that may have discouraged you from engaging in such harmful acts and legitimised the abuse.
>
> We consider that this harm supportive thinking is transferrable to the children's sector where you could be responsible for the care/wellbeing of children and there is no evidence that you have sought to address this.
>
> …
>
> In your representations, you focus on the impact that a bar could have on yourself and the fact that you were not to be possession of any child pornography, rather than any harm perpetuating effect that accessing/downloading bestiality could have.
>
> ….
>
> In conclusion, you admitted that you accessed/downloaded movies/images of Bestiality as you were interest in this. In doing so, you perpetuated / legitimised this form of online sexual abuse and the fact that you retained the movies/ images indicates that it is likely that you derived sexual gratification from these. You show no insight as to how your actions are harmful/ your representations focus on the impact that your offending behaviour has had/could have on yourself. We also consider that your faulty/harm supportive thinking is transferrable to the children's sector where you would be responsible for their care/wellbeing.'

94. The DBS was entitled to conclude that the material the Appellant sought, has been cautioned for possessing and the evidence he gave about this demonstrated his 'harm supportive thinking' that the abuse of adults and animals involved in such material is acceptable. The Appellant recently and willingly broke the law for his own pleasure by viewing and possessing such material.

95. We are satisfied that it was rational for the DBS to decide that the Appellant demonstrated no insight into the harm caused to humans (to him as viewer and the human participants in the material) by his viewing and storing of criminal pornography and that viewing the material perpetuated the harm. The DBS was entitled to find that the Appellant manifested 'harm supportive thinking' and was prepared to transgress legal boundaries that gives risk to an assessment and this mindset may transfer such that he may pose a risk to children in his care. It is not for us to conduct our own risk assessment or substitute our own view on appropriateness but the 'transferability of mindset' was a rational reason for the DBS to rely on.

96. We are satisfied that the DBS was reasonably entitled to conclude that the Appellant's propensity to view the material and lack of insight thereafter puts him at risk of causing harm when caring for or supervising children. The DBS were entitled to conclude that the Appellant has demonstrated a failure to display basic judgement as to what activity is legal or appropriate or observe sexual boundaries. The DBS's risk assessment is rational that the Appellant poses a material risk to the safety of children, by his reduced ability to recognise harm and thus he poses a risk in that he may be impaired in his ability to protect children from harm.

97. The fact that the Appellant sought harmful sexual material for his own gratification, and his lack of insight / attempts to legitimise his actions supports the DBS's assessment that the Appellant finds such content acceptable. The DBS was entitled to decide that this raises significant concerns in respect of the Appellant's ability to appropriately identify harm and take necessary action to address this in respect of others. Therefore, the DBS was entitled to conclude that public confidence would be undermined by permitting the Appellant to work with children.

98. Further the Appellant has not since taken steps to understand why he behaved this way. His attempt to justify his behaviour by the greater harm that eating or testing animals may cause demonstrated a failure to recognise the abuse to adults that is caused by the images / videos. The DBS was entitled to conclude that the Appellant was somewhat de-sensitised to harm and it is therefore of concern that the Appellant has a reduced capacity to acknowledge abuse. This poses a risk in the Appellant appropriately caring for any children for whom he would be responsible in a regulated activity.

99. For example, this might mean when caring for or supervising children in his care, whether in physical or online activities – the Appellant poses a risk of deliberately or negligently exposing children to risk of harm from a range of sources, whether that be information he provided to them, showed them or failure to regulate the material, images or videos, they had access to. The fact that the Appellant himself is not proven to have any sexual interest in children does not undermine the rationality of the DBS's assessment that the Appellant has demonstrated a risk that he may put children at risk of some kind such as physical, emotional, psychological or sexual harm.

Ground 9

100. We are satisfied that the Decision was not based on the Appellant's unconventionality. The DBS's assessment of risk did not wrongly take into account the Appellant having some kind of unconventional lifestyle.

101. The suggestion that: "[The Appellant] is a closet transvestite who posed in chatrooms as a woman", if it is a fact, was not given any weight or taken into account by the DBS in the Decision generally or, more specifically, when it came to the DBS's consideration of proportionality. An alleged over-emphasis, by the DBS, on this element of "unconventionality" is not, therefore, a ground on which the Decision can be properly challenged in this appeal.

102. Further, elsewhere in the first paragraph of the Observations, the permission decision referred to "images of children" and a "chat-line". At paragraph 6, concern was expressed about redactions and the permission decision referred again to "indecent images of children". The evidence indicates that the Appellant was, at one point, suspected (by someone) of offences relating to children. But any such suspicions came to nothing: there was no evidence to support them and they were not pursued nor taken into account by the DBS.

103. Moreover, the Decision expressly recognised: (i) the "fact" the Appellant was found not to be in possession of any child pornography; (ii) that the police had referred to the Appellant's previous "good character"; and (iii) that there was "no evidence" the Appellant had directly harmed a child.

104. Further, the Decision focused on the Caution and matters relating specifically to it; there is nothing in the Decision to support any allegation it was based, in any material way, on any alleged suspicions relating to the Appellant's involvement in indecent images of children, or that the DBS took any such suspicions (of others) into account or gave them any weight whatever in coming to its conclusion on proportionality or on any other relevant part of the Decision. Accordingly, the Decision cannot be judged as being made in error of fact or law in this appeal, on the basis that such things formed part of an alleged view by the DBS on the Appellant's "unconventionality".

105. Third, the Caution established that the Appellant's proven/admitted conduct went well beyond what could properly be limited to "unconventional" behaviour. It established illegal criminal conduct. Parliament has decided, and legislated, to expressly make possession of "extreme pornographic images" of a "person performing an act of intercourse or oral sex with an animal" an offence. Moreover, Parliament legislated to include that particular offence on the list of offences for which the DBS "must" bar a qualifying individual, subject to any representations from them, where R considers such a bar to be appropriate. Accordingly, the Decision cannot be said to have involved a mistake of law or fact, on the basis that the Caution and/or offending behaviour constituted "unconventionality".

Article 8 Proportionality

106. We are satisfied from reading the Decision that the DBS did conduct a "balancing act" and an adequate one when considering the proportionality and impact of barring upon the Appellant.

107. We are satisfied that the Decision can be justified as a proportionate measure in order to adequately safeguard children in the community and/or maintain public confidence in the regulatory scheme. The Appellant effectively accepted in evidence, as we have set out above, that inclusion on the CBL will not reduce his income to any significant extent and he has a comfortable and secure level of income and assets.

108. As for the length of the minimum barring period, this is set by statute and is not disproportionate to the public interest pursued in safeguarding children - the

Appellant has a right to request reviews based on new material under paragraphs 18 and 18A of Schedule 3 to the Act.

109. Further relevant factors include/included:

(a) a chief concern of the Appellant appeared/appears to relate to his inclusion on the CBL becoming public knowledge or otherwise being disclosed or revealed inappropriately, and a stigma then attaching to him, or his family, as a result of false perceptions by others in the community (i.e. that being placed on the CBL means or implies that he is a paedophile), along with some potential (albeit unparticularised and unevidenced) "backlash" from within the community.

However genuinely such views might have been held by the Appellant, subjectively, they did not constitute a good, or a good enough, reason not to bar the Appellant. Among other things: (i) the CBL is not published and is confidential; (ii) the DBS does not disclose the names of those on the CBL to members of the public just because they make an enquiry, and the DBS has data security obligations; (iii) the perceptions of others, false or otherwise, in relation to what being on the CBL may mean, cannot be controlled and is not the responsibility of the DBS; (iv) other, adequate protections are in place to protect the Appellant from the possibility of inappropriate "backlash" (the police, criminal law, civil injunctions, anti-harassment laws, defamation law, etc); (v) the Caution would continue to be a matter of record, in any event; (vi) he has the benefit of anonymity and reporting restrictions in this appeal;

(b) the Appellant, in any event, had expressly indicated to the DBS in the Representations that he would not be applying, in future, for the types of roles for which a DBS check would be required. As such, the extent of any infringement on his Article 8 rights was significantly more limited than it would otherwise have been;

(c) while the Appellant had worked previously as a (university) lecturer, being a lecturer is not ordinarily a role that would fall within "regulated activity" and there was no, or no sufficient evidence provided in writing or at the hearing that he was lecturing "children" (his only involvement with children had been as a scout leader or potentially moderating an online forum that children may use);

(d) the Appellant made no representations in relation to his current work, before the Decision was made. However, he included an argument in relation to same in his Grounds of Appeal and at the hearing. This is addressed above, but, in essence, this, again, cannot be a good enough reason to render the Decision disproportionate.

110. All of these factors, whether taken individually or collectively, were and are *outweighed* by the substantial public interest in safeguarding children and/or the importance of maintaining public confidence. The public, and those who entrust their children into the hands of others, have a right to expect/demand that people placed in such important positions of trust working with children are fit and proper individuals.

111. We are satisfied that it was neither irrational nor disproportionate for the DBS to decide in was both reasonably necessary and appropriate to bar, in the circumstances, in pursuance of the DBS's legitimate aims. The DBS was entitled to take account of public confidence, in the effective operation of the statutory safeguarding scheme, would have been undermined by a decision to allow the Appellant to engage in regulated activity with children.

Conclusion and Disposal

112. We conclude that the decision to include the Appellant on the CBL involved no mistake on a point of law nor in a finding of fact. The DBS made no mistake of law or fact when including the Appellant on the CBL on 24 July 2019.

113. The appeal is dismissed. The Respondent's decision must be confirmed pursuant to s.4(5) of the Act.

Signed (on the original) Rupert Jones
Judge of the Upper Tribunal **20 December 2021**