



THE UPPER TRIBUNAL ORDERS that no one shall publish or reveal:

the name or address of (a) CB who is the Appellant in these proceedings or (b) X who is her former partner;

any information that would be likely to lead to the identification of either of the above or any member of their families in connection with these proceedings.

The decision itself may be made public, but not the cover sheet, which is not part of the decision and identifies CB by name.

**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: V/1751/2020
[2022] UKUT 30 (AAC)**

CB v DISCLOSURE AND BARRING SERVICE

Decided following an oral hearing on 18 January 2022

Representatives

Appellant	Laith Dilaimi of counsel, instructed by Duncan Lewis Solicitors
Disclosure and Barring Service	Carine Patry of counsel, instructed by instructed by Laura Findlay of the Disclosure and Barring Service

DECISION OF THE UPPER TRIBUNAL

On appeal from the Disclosure and Barring Service (DBS from now on)

DBS Reference: 00917754020

Decision letter: 10 August 2020

This decision is given under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA from now on):

DBS did not make mistakes in law or in the findings of fact on which its decision was based. Its decision is confirmed.

REASONS FOR DECISION

A. The issue and how it arose

1. This appeal involves an issue that has arisen recently in a number of appeals. To what extent can an appellant compartmentalise conduct so that what they have done in their private life cannot be read across into a risk in regulated activity?
2. CB has been convicted of a number of offences over the years, most significantly attacks on her now former-partner, whom we call X. None of the offences was committed in the context of regulated activity. DBS included her in the Children's Barred List and the Adults' Barred List. Upper Tribunal Judge Jacobs gave her permission to appeal to the Upper Tribunal on this ground:

I have given permission on the ground of possible errors in DBS's conclusion that CB's conduct can be related to a risk in the different context of regulated activity with children or vulnerable adults. I regard the specific grounds of appeal, set out in the amended grounds and in Mr Dilaimi's skeleton argument for the hearing, as merely examples of this specific issue.

The issue I have identified as the ground of appeal arises in a variety of contexts in this jurisdiction. The starting point is paragraphs 3 and 4 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 and the equivalent provisions for vulnerable adults. As Mr Dilaimi realistically accepted, CB's behaviour towards her former partner, whatever the precise details, would harm a child if repeated against that child. That leaves the issue whether it was appropriate to include her on either list. Any mistake of fact or law must be found within the DBS's reasoning on that issue. Unfortunately, the DBS's reasoning is not always entirely explicit on the findings it has made or their significance. To take an example discussed at the hearing, the DBS referred at page 163 to both the OASys report (page 109 and following) and the subsequent probation officer's memo (page 128). There was a difference of view. The rationale (page 164) refers to both without preferring one to the other or seeking to reconcile them. The conclusion was that there were 'some concerns' based on the overall effect of that and other evidence.

I hope that, with counsel on both sides, it will be possible to give some general guidance on the correct approach to identifying appealable errors in cases like this whilst respecting the limit on the Upper Tribunal's jurisdiction under section 4(3) of the Act.

B. The challenges to the decision

3. There are different ways in which an appellant might try to show that actions in their private life outside of regulated activity can be isolated for the purposes of DBS's assessment of their likely conduct in that activity. One way is to minimise what they have done in order to reduce its significance in the assessment. Another is to use their clean record in regulated activity to show that they can compartmentalise their lives.
4. We follow that structure by looking at: (a) what CB has done and its potential significance for regulated activity; and (b) the type of work CB has undertaken in

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which she has remained free from any safeguarding concerns. Before that, we set out our jurisdiction and explain how the legal issue arises in this case.

C. Section 4 SVGA

5. The Upper Tribunal's jurisdiction and powers are in this section:

4 Appeals

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

...

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

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

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

(a) on any point of law;

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

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

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

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

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

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

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

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

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

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

...

D. The legal provisions that led to DBS's decision

6. We illustrate the legal position using the provisions for the adult's barred list. There are equivalent provisions for the children's barred list. Paragraph 9(3) of Schedule 3 to SVGA provides:

- (3) DBS must include the person in the adults' barred list if–
 - (a) it is satisfied that the person has engaged in relevant conduct, and
 - (aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children,
 - (b) it is satisfied that it is appropriate to include the person in the list.

'Relevant conduct' is defined in paragraph 10 and includes:

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

7. There is no doubt that: CB engaged in relevant conduct within the meaning of paragraph 10(1)(b); and she wants to engage in regulated activity relating to children and vulnerable adults. The only condition in issue is whether it is appropriate for her to be included in a list. That is a matter for DBS, but it depends on linking her conduct to the risk she would pose in regulated activity.

E. CB's offences and related conduct

8. We begin with the offences of which CB has been convicted. There have been other allegations made against her, which (with one exception) we have put aside. We also deal with that exception. It is right to record that in 2019 CB was found not guilty of seven other offences relating to X between 2011 and 2019.

Offences

9. CB was born in 1986. She has been convicted sporadically throughout her adult life. Her first conviction was in 2006 for driving without a licence or insurance in 2005. In 2014, she was convicted of offences relating to benefit fraud dating back to 2009. Later in the same year, she was convicted of failing to comply with a community order related to the benefit convictions. These show a willingness to disregard the law for personal financial reasons.

10. CB also has convictions relating to police officers. In 2006, in connection with the motoring offences, she was convicted of resisting or obstructing a police officer. And in 2018, she was convicted twice in relation to police officers, once for assault and once for resisting or obstructing a police officer. We accept that assault does not necessarily involve physical contact, let alone violence, although it may involve both. And resisting or obstructing an officer can take a variety of forms. But even taking the most favourable view of these convictions, they show a failure to comply with directions from persons in authority and a lack of respect for those enforcing the law.

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11. In 2019, CB was convicted of two offences of assault occasioning actual bodily harm to X, leading to imprisonment. These are the most serious of the offences so far as being included in a list is concerned. One assault occurred in 2016. During this assault, she kicked X in the face, breaking her nose. CB pleaded guilty, but told us that she had not pleaded guilty to X's account. She accepted that she had kicked out and hit her, but denied any intention to do so. The other assault occurred in 2019. During this assault, she came to X's flat where an argument ensued. X was frightened enough to climb out of her second floor flat window and jump about eight feet to the ground. She broke three bones in her foot, which required a plaster cast to her knee and the use of crutches. Once again, CB told us that she did not accept the whole of X's account, although she admitted that she may have been reckless. These assaults occurred in the context of a deteriorating personal relationship. They were vicious and they were repeated with the later assault worse than the earlier. Her account to us tried to minimise her involvement. Just to take one example of CB trying to minimise her role, she told us that in 2019 she had acted in self-defence. As Ms Patry pointed out, self-defence would be a complete defence. As CB was convicted, we know that the court did not accept that defence, assuming it was put. This may be part of her attempt to live with what she did or it may be a tactical position for these proceedings. The approach we have taken is to rely on the objective evidence available and on her own statements against her interest at the time. This will provide the safest minimum findings that can be made. CB also tried to emphasise recklessness rather than intention in both assaults. That is not to her benefit. If her actions were intentional, they show a willingness to resort to violence at times of intense personal feelings. If they were reckless, they show an inability to recognise what was happening and to exercise self-control.

The incident in the shop

12. We said that we have taken into account one incident that did not lead to a conviction. This occurred in a Zara store in 2016. CB had an argument with a shop assistant about the pricing of an item. When the manager was called, the argument became more heated and she was escorted out of the store. As she left, she threw a perfume bottle that hit the manager on the head. This did not lead to a conviction. CB told us it had been a case of mistaken identity and that it had been thrown out by the court. We do not know whether the case was thrown out by the court, but we know that it was not a case of mistaken identity. We can be sure of that because of CB's own statement at the time (page 56). She gave an account in which she threw the bottle across the counter without intending to hit anyone, but accepted that she had been reckless and could have caused injury.

13. This incident is relevant for these reasons. CB demonstrated a problem with impulse control and emotional management. She showed no ability to step back from confrontation and indeed escalated her actions when confronted by an authority figure, finally resorting to violence. Importantly, this violent reaction occurred outside a personal relationship. As with the assaults on X, CB tried to minimise what happened, despite her own statement at the time.

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The risk assessments

14. There are two assessments of CB's risk in the papers. The author of the OASys Assessment on 2 June 2020 put her risk as medium, meaning (page 118) that:

there are identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change of circumstances, for example, failure to take medication, relationship breakdown, drug or alcohol misuse.

The author explained (page 120) that the risk was medium 'because of the nature of the offending and denial and minimisation that [CB] continues.' The Probation Officer who was the author of the memo at page 128 on 9 June 2020 wrote:

As stated in the OASys, despite her OGRs being low, I disagree with this due to the nature of the offending, and denial and minimisation, and that [CB] refuses to do work centred around DV [domestic violence] and would rather focus on anger management. She has not done any extensive work in prison and has only really just begun the 1-1 session work. Therefore, it is my assessment that it is too early to say that she should be reduced.

As mentioned previously she engages well, and her supervision sessions are now geared towards 1-1 offending behaviour work. [CB] hasn't done a substantial enough amount of work to warrant a decrease in risk, however she is not assessed as a risk to children and vulnerable adults.

There was an issue at the hearing whether the same person wrote both the Assessment and the memo. The natural reading of the first paragraph we have quoted, is that they were the same. There was also an issue about what was meant by a risk to 'Known Adult' (page 114). Did that mean just X and future intimate partners? We are not able to resolve that on the evidence before us. Whatever the expression means, there were also references to risk arising from perceived disrespect by authority figures and if CB is not happy with boundaries, and if she is challenged by others.

15. CB told us that she had done more work while in prison but not all the courses she wanted. She also said that she had not got the help she wanted after prison. That may be so, but it highlights that CB has not received all the help and support that even she believes she needed and needs.

F. CB's work history

A time line

16. In her witness statement to this tribunal, CB said: 'I became a youth worker at age 16 after finishing High School'. That is far from accurate. In order to assess the significance of her clean record in work, we have to look more closely at what she was doing between 2002, when she left school at 16, and 2019 when she was sent to prison.

17. We began the hearing by trying to establish her work history in chronological order. Despite having a witness statement, a CV, and references, it took her oral evidence before we were able to establish a general order and some idea of the work

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she was doing. The oral evidence emerged under questioning from Mr Dilaimi, Ms Patry and the tribunal members. CB spoke at length about the kind of things she had done, but we never established a clear statement of exactly what her involvement with children and young persons had been. What follows was the best we could do. We begin by acknowledging what is to her credit.

18. CB told us that she had never hurt a child or young person in the course of her work. We accept that. It is right also to acknowledge her qualities. She has a talent for music and an aptitude for dealing with children and young people. In the course of the work she had done with them, she has achieved much good.

19. In her witness statement, CB said: 'Throughout my working history, I have regularly engaged with young people who confronted me, sometimes disrespecting me.' When asked, CB was able to recall only two specific incidents, although we are sure that there would have been some lesser ones. We accept her accounts of the two incidents. In one, a child spat in her face. In this incident, she was able to remain calm without reacting to what had happened. She was upset by what the child had done, but was able to empathise with him in order to understand why he had done it. She then worked with him to formulate a plan to get the help he needed. In the other incident, which was outside work, she witnessed a confrontation in the street that was getting out of control. She was able to maintain a distance from what was taking place. She acted to de-escalate this incident, to diffuse what was a growing confrontation, and to maintain safety for those involved until the police arrived.

20. We now come to her work history.

21. From 16 to 18 (2002-2004), she worked through music and poetry to provide support to children, attending youth clubs. She was working with one to three others, but sometimes on her own. The local authority noticed her rapport with children and arranged for her to take an Introduction to Youth Work course in 2005.

22. At 18, she volunteered over the summer to work at a school using music. She was then offered a position of youth support. She took the middle ground between the pupils and the school, adapting the curriculum to help children remain in education. This might involve one to one work, or sitting in on lessons.

23. Her history then became vague. She told us that she was not sure what she did, but it involved music and she worked with youths. She took a Level 3 Diploma in Youth and Community Studies, referring to a placement, work with the London Mayor and involvement with a youth club in 2008 to 2012. She mentioned keeping children out of crime by challenging them through sport. She spoke of projects with artists aged 12 to 17, helping them with equipment and confidence building.

24. From 2012 to 2014, she worked for Crewcial Events. As far as we could discover, she was working with organisations like television companies and leading brands at events such as filming. Her role was to ensure that people were in the right place at the right time. Those people may have been youths, but not necessarily. She probably did work with youths, but not exclusively, and the work was not youth work in any way comparable to regulated activity.

25. From 2014 to 2017, she cared for her ill grandmother who had dementia. This was not in any sense youth work. Her grandmother was, though, a vulnerable adult, and CB's role would have been demanding and challenging, all the more so because

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of her personal relationship with her grandmother. This might have provided some good examples relevant to safeguarding, but we heard none.

26. From 2017 to 2019, she worked for Care 2 Share and then Care 2020. The work was with the most vulnerable young people. She was assigned to a key child as a point of contact. This involved intense training.

27. In 2018, she completed the first year of her degree course in Psychological Theory and Practice. She could not continue because she was sent to prison. She could not resume the course, because it would involve placements that she could not undertake on account of being included in the barred lists.

28. There is one troubling incident in 2019 involving a school where CB was using the sports hall. She was concerned that X was having an affair with a teacher. She attended at the school, threw chairs at the wall, damaged a painting and bit a teacher who intervened. She was barred from the school premises. She told us that she was in part of the premises away from children. This incident is troubling, because of where it occurred and because it shows CB's actions starting within her personal relationship and spilling outside her personal environment into a work environment where children might at least witness what was happening.

G. Our analysis

29. DBS's reasoning linking CB's convictions to regulated activity is rather perfunctory. The issue is whether that deficiency is material. We have decided that it is not, because the evidence we have is sufficient to justify its decision.

30. We begin with the convictions. We have made minimal findings, relying on the best evidence of what happened and avoiding as far as we can the disputes on points of detail raised by CB's evidence to us. In short, we have identified the factual foundations for the convictions in the way most favourable to CB.

31. Using our limited findings, CB is willing to break the law for personal benefit, fails to comply with directions from persons in authority, and shows a lack of respect for those enforcing the law. The assaults on X are the most relevant of the convictions. Even on our findings, they were vicious. CB tries to minimise her role, even in the face of independent evidence and her own statements. This was noted in the OASys Assessment and remains so today. Within a personal relationship she lacks impulse control and emotional management, causing her to do things either deliberately or without the power to repress her feelings and instincts. She has not shown that she accepts fully the seriousness of these features of her behaviour. She may not recognise that she possesses them.

32. The incident in the shop is significant because it happened outside the context of a personal relationship. It shows that she lacked an ability to step back and walk away. She allowed the incident to escalate and had no control over her feelings or responses.

33. It seems by her own account that she has not completed the sort of work while in prison or later that would help her overcome these problems.

34. The probation service's risk assessment is in CB's favour in so far as it says that there is no risk to children or vulnerable adults. DBS was not, though, bound by

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it. It took it into account, but its value had to be assessed in the context of the other evidence available. We have dealt with the factors related to CB's convictions. It was rational of DBS not to rely on the risk assessment given the other evidence. There was no mistake of law in that approach.

35. Coming to her work with children and young persons, she was able to give examples of how she had been able to control her impulses when spat on by a child. She was also able to step in to a confrontation that she was not part of to keep everyone safe. These are, though, isolated incidents and need to be set in the context of the roles she was undertaking.

36. There was no continuity in CB's work with children and young person from the age of 16. For part of that time, she was caring for her grandmother with no involvement with children or young persons. For another part of the time, she was working in events with only incidental involvement with children or young persons. In total, those periods account for about five years. For the rest of the time, we heard a plethora of detail about things that CB had done, but did not hear a clear account of: exactly what was involved in the formal roles she undertook; whether they were full or part time; whether they were paid or voluntary; the extent to which she was working with or supervised by others. Most important, we did not have information to show that CB was significantly tested in her ability to remain detached when her authority was challenged or when she felt disrespected or if she became emotionally attached to someone under her care. That limits the extent to which the work she undertook can show an ability to compartmentalise her behaviour.

37. CB's behaviour can be impulsive and beyond her ability to control. It is not limited to personal relationships and can occur in other environments, even when the origin lies in her personal life. Those factors allow it to be read across into regulated activity. Her experience in working with children and young persons is too uncertain to allow us to come to a firm conclusion that she has any experience that would show an ability to confine her behaviour to her personal life. Taking those together provides a sound basis on which DBS could decide that it was appropriate to include CB in its lists.

38. That is why we have confirmed DBS's decision.

**Authorised for issue
on 02 February 2022**

**Edward Jacobs
Upper Tribunal Judge**

**John Hutchinson
Sallie Prewett
Members**