



**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

***Appeal No. UA-2023-000901-V  
[2024] UKUT 159 (AAC)***

**The Upper Tribunal has made an order prohibiting the disclosure of any matter that is likely to lead to the public identification of DJB, her foster child at the relevant time, or five other individuals specified in the order (page 168 of the Upper Tribunal bundle)**

**Between:**

**DJB**

Appellant

- v -

**Disclosure and Barring Service**

Respondent

**Before: Upper Tribunal Judge Citron, Mr Turner and Ms Jacoby**

Decided following an oral hearing on the CVP video hearing platform on 27 March 2024

**Representation:**

Appellant: by herself

Respondent: by Bronia Hartley of counsel, instructed by DLA Piper

## **DECISION**

**The decision of the Upper Tribunal is to dismiss the appeal. The decision of the Respondent made on 23 March 2023 (reference DBS6191 00986829326) to include DJB in the children's and adults' barred lists is confirmed.**

**REASONS FOR DECISION**

**This appeal**

1. This is an appeal against the decision (the “**decision**”) of the Respondent (“**DBS**”) dated 23 March 2023 to include DJB in the children’s and adults’ barred lists.

**The decision**

2. The decision was made under paragraphs 3 and 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (the “**Act**”). These provide (in very similar terms as regards both children and vulnerable adults) that DBS must include a person in the relevant barred list if
  - a. it is satisfied that the person has engaged in relevant conduct,
  - b. it has reason to believe that the person is, or has been, or might in the future be, engaged in regulated activity relating to children/vulnerable adults, and
  - c. it is satisfied that it is appropriate to include the person in the list.
3. Under paragraphs 4 and 10, “relevant conduct” includes, amongst other things, conduct which endangers a child/vulnerable adult or is likely to endanger a child/vulnerable adult, or which, if repeated against or in relation to a child/vulnerable adult, would endanger them or would be likely to endanger them; and a person’s conduct “endangers” a child/vulnerable adult if she (amongst other things)
  - a. harms them or
  - b. causes them to be harmed or
  - c. puts them at risk of harm.
4. The letter conveying the decision (the “**decision letter**”):
  - i. stated that DBS was satisfied that DJB had engaged in relevant conduct in relation to children, on the basis that she had engaged in conduct which endangered a child or was likely to endanger a child;
  - ii. stated that DJB had also engaged in conduct which, if repeated against or in relation to a vulnerable adult, would endanger that vulnerable adult or would be likely to endanger them;
  - iii. stated that DBS was satisfied that DJB
    - a. did not sufficiently safeguard her foster child (“**C**”) by adhering to the expectations with regard to her (DJB’s) new partner (“**B**”) which caused the end of C’s placement with DJB – causing distress to C
    - b. did not disclose that B had two convictions for sexual offences
    - c. engaged in deceptive behaviour regarding B by breaching the statement of expectations she (DJB) signed, with regard to B spending the night at her home, being present when C was there,

how long the relationship had been going on, and for how long she had known about B's conviction;

(we refer to the findings above as DBS's "**core findings**");

- iv. stated that DBS was satisfied that a barring decision was appropriate, because DJB had caused emotional harm to C by causing her placement to end in an unplanned manner; DJB's actions could have placed C in a position where she could have been harmed;
- v. made further factual findings (in addition to DBS's core findings), as follows:
  - a. DJB did not adhere to the statement of expectations set out by the fostering organisation;
  - b. DJB knew about B's offences and chose not to disclose them in a timely manner;
  - c. given her extensive experience working with vulnerable adults and children, DJB would have been fully aware of the implications (for her position) of entering into a relationship with someone who had previous sexual offences; and the importance of disclosing such offences. This was especially relevant as one of the cautions was that B, when aged 19, sent an picture of his erect penis to the 13 year old sister of his ex girlfriend: B had pretended to be a boy the 13-year-old liked at school and told her he loved her. B had said his motivation was revenge rather than sexual as he was angry that his girlfriend had ended the relationship. Given that C was almost 13 at the time DJB started the relationship with B, DJB should have been aware of the similarities in ages of the victim (of B's offence) and C;
  - d. DJB engaged in deceptive behaviour to cover up that B stayed overnight by saying that B had to leave his work van outside her house as it was a safe place; and that B left his car there overnight due to safety factors. No evidence was provided to support this - such as employer information. The scenario seemed implausible as B would need his car to retrieve his van in order to go to work;
  - e. DJB had placed her needs for a relationship ahead of C's needs. DJB did not consider the impact her new relationship (with B) would have nor did she consider B's convictions and how they could affect C's safety. DJB had only considered herself;
  - f. DJB did not seem to understand the legitimate concerns that social services raised about her relationship with B. DJB did not comply with the expectations they set for a gradual introduction of B into DJB's home.

**Jurisdiction of the Upper Tribunal**

5. Section 4(2) of the Act confers a right of appeal to the Upper Tribunal against a decision by DBS under paragraphs 3 and 9 of Schedule 3 (amongst other provisions) only on grounds that DBS has made a mistake
  - a. on any point of law; or
  - b. in any finding of fact on which the decision was based.
6. The Act says that “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)).

**Grant of permission to appeal**

7. Permission to appeal was given by the Upper Tribunal in a decision issued on 4 November 2023. Upper Tribunal Judge Citron expressed his reasons for giving permission to appeal, as follows:

“1. DBS’s decision is based on [its core findings].

2. One of these (allegation 2: that DJB did not disclose that [B] had two convictions for sexual offences) does not appear to be challenged by DJB, as a *factual finding* (apart from the challenge that these were “cautions”, rather than “convictions” – but this does not appear to me to be a *material* mistake of fact, in the overall context).

3. DBS’s other two [core] findings are, however, challenged.

4. It seems to me realistically arguable that DBS made material mistakes in its “allegation 3” and “allegation 1” factual findings, since:

a. DJB has provided written evidence to the Upper Tribunal as to why her behaviour was not “deceptive” and why she *did* “sufficiently safeguard” [C] (including at pages 14 and 15 of the bundle); DBS did not find DJB’s evidence prior to its decision, persuasive; however, it is realistically arguable that oral evidence from DJB (in a hearing before the Upper Tribunal) could show that, on the balance of probabilities, her behaviour was not “deceptive”, and that she did “sufficiently safeguard” [C];

b. allegation 3 refers to DJB having breached a statement of expectations that she signed as regards specified events involving [B]; and allegation 1 refers to her not having adhered to “the expectations with regard to [B]”; however, per the evidence in the bundle, the “statement of expectations” appears to have been signed on 18 January 2022, which was after some or all of these events (involving [B]) took place.

5. It also seems to me that, if DJB were to be able to establish mistakes by DBS in some or all of [its core findings], it would then be realistically arguable that DBS made a mistake on a point of law by making a decision that was disproportionate.”

**Documentary evidence before the Upper Tribunal**

8. In addition to the decision letter, evidence in the bundle of 193 pages included:
- a. DJB's application to the relevant fostering agency to become a foster carer (March 2019) and reference letters in support
  - b. meeting notes about C's placement with DJB, 18 January 2022
  - c. the fostering agency's "statement of expectations" signed by DJB and supervising social worker, dated 18 January 2022
  - d. the fostering agency's supervising social worker's review report following allegations made against DJB, dated 6 February 2022
  - e. letter from DJB in response, dated 1 March 2022
  - f. DJB's representations to DBS
  - g. four character references for DJB, one from someone whom DJB had taken care of whilst they were in foster care, and three from former colleagues/friends
  - h. a letter from DJB's mother, who lived next door to her
  - i. messages between C and DJB
  - j. messages between B and DJB
  - k. DJB's letter of appeal
  - l. DBS's "Barring decision summary" document.

**The Upper Tribunal hearing**

9. DJB attended the hearing, presented both arguments and evidence, and was cross examined on the latter by Ms Hartley, who also made submissions on behalf of DBS.
10. The hearing had originally been listed to be "face to face" in London; however, it came to light about a week before the hearing date that the Upper Tribunal would be unable, for logistical reasons, to convene a panel to sit in person in London (but could convene a panel to sit "remotely"). The tribunal therefore proposed to the parties that, in order not to "lose" the hearing date, the mode of hearing be changed to CVP video hearing. Neither party objected to this course and so the hearing went ahead in that way. We were satisfied that all participants in the hearing, including the panel, were able to see and hear the proceedings to the standard necessary for a fair hearing.

**The background facts**

11. To frame the discussion which follows, it is helpful first to set out the background facts. To a considerable extent, these background facts are based on unchallenged evidence. To the extent that they touch on evidence or issues that were in dispute, we have either cited the evidence on which they are based (by way of explanation of our finding), or simply recited the evidence (and not made a categorical finding, at this stage in our decision).
12. Our overall approach to the evidence – documentary and oral – was to review it critically and realistically. We tended to give evidence more credence to the

extent it was corroborated, closer in time to the events it described and/or objectively plausible.

13. The background facts are as follows:

- a. DJB (then aged 40) was approved as a foster carer with the relevant fostering agency in August 2019. She then had three foster care placements (one very short) prior to C.
- b. C, then aged 12, was placed as foster child with DJB in March 2021.
- c. In February 2021, DJB informed the fostering agency that, since January 2021, she had been in a new (romantic) relationship, with B (immediately prior to that, she had not been in such a relationship).
- d. DJB had met B some years before, when she was working as a support worker at a residential school where B, then aged 13, was a residential boarder (DJB was 26 at the time).
- e. At the time of starting this relationship with DJB in January 2021, B was in another relationship with, and living with, a woman who was then pregnant with his child.
- f. DJB asked (at the time of telling the fostering agency about her new relationship with B) that B be DBS-checked to enable him to visit “the home”; and DJB and the supervising social worker discussed safeguarding expectations with regard to C as DJB’s foster child, in particular that B should not be left alone with C. The social worker expressed concerns about DJB’s relationship with B and the speed at which it was developing (such that DJB wanted to introduce B to the fostering household). The social worker reiterated the importance of further checks on B. DJB said that B was willing to undergo a DBS check and any other checks required to become part of the fostering household.
- g. In March 2021 DJB cancelled the request that B be DBS-checked, as she had decided against going forward at that time with the relationship with B, and would be prioritising fostering. DJB told the fostering agency, by way of explanation, that B had refused to leave his (other) partner and newborn daughter.
- h. In early April 2021, DJB’s relationship with B restarted (we make this finding based on DJB’s 1 March 2022 letter responding to the fostering agency’s report).
- i. In September 2021 DJB told the supervising social worker that she had restarted the relationship with B, who had been visiting and “having overnight stays” (this is how the social worker’s February 2022 report put it; DJB’s 1 March 2022 letter said that B left his other partner on 19 September 2021 and then stayed at her house for two nights). DJB told the social worker that she envisaged B moving in and wanted him assessed to become an approved foster carer. The fostering agency responded that they would not progress an assessment of B as a foster carer at that time, but would undertake a “viability assessment” which, if successful, would allow B to have overnight stays periodically. DJB was told that, in the interim, B was not to be left unsupervised with C at any time, and DJB had to inform the agency in advance of when B was

visiting – until appropriate safeguarding checks were undertaken. No DBS check was, in the event, completed.

- j. In October 2021 DJB expressed frustration over the delay in checks being completed to allow B to have overnight stays. The supervising social worker and a team manager from the fostering agency visited and made clear that they would need to see the relationship being stable and continuous for over 12 months before they would be willing to begin the assessment.
- k. A new supervising social worker was assigned in early January 2022. They made an “unannounced visit” on 11 January 2022, in the evening, when B was “known to be present”, “to assess the home and family dynamics” (quotations are from the February 2022 social worker’s report); B was not present initially, but arrived late. A remark by B to DJB during this meeting – asking her to remind him what time he had left the house that morning – indicated that B had been staying over at DJB’s house. Questions were asked about the car that B drove, in response to which DJB told the supervising social worker that B had been told to keep his van parked at DJB’s home as the area he was staying in was unsafe.
- l. On 17 January 2022, at the first “viability assessment” between the fostering agency and B, B disclosed that he had received a police caution for ‘malicious communication’ when he was 19 years old, for sending a WhatsApp indecent picture of an erect penis to a 13 year old girl, the sister of B’s ex-girlfriend (aged 19); B had pretended to be a boy he knew the 13-year-old had a crush on in school and sent her messages telling her he loved her; B stated that his intention was not sexual, but because he was angry with the older sister for ending their relationship, and he wanted revenge. B said that he had been open with DJB about this information from the outset, as he knew it would be a problem. The viability assessment then stopped; B was directed to remove his items from DJB’s home and not to visit or have any contact with C. DJB was contacted by the supervising social worker that day and told of the decision not to proceed with the viability assessment for B. DJB said she had only recently been made aware of B’s caution, but B disagreed, saying he had been “honest with her” from the outset.
- m. Further information was sought from the police, who said that B had also received a police caution in April 2021 for exposing himself to a neighbour by masturbating in a doorway using his phone to film himself. (B’s explanation was that he shared these images with an ex-partner and did it outdoors so his then-current partner would not be aware).
- n. The fostering agency and local authority decided to remove C from DJB’s home – this happened the next day (19 January 2022), which happened to be C’s 13<sup>th</sup> birthday. DJB opposed the removal and both she and C were visibly upset and crying when it was taking place. In the course of these events, DJB told C about B’s caution, what it was for, and the fostering agency’s reaction to it.
- o. DJB resigned as a foster carer on the following day, 20 January 2022. She was later de-registered.

**Summary of DJB’s main arguments and evidence on contested matters**

14. As she was not legally represented, DJB presented arguments and evidence all in one. We summarise her main arguments, and evidence (insofar as it was on contested matters), as follows:

*Safeguarding C*

15. DJB contended that she did properly safeguard C; in particular, she did not leave C on her own with B in the house.

*Knowledge of B’s cautions for sexual offences and efforts to get B “checked”*

16. DJB said that B told her about the cautions but not what they were for; she said she thought they were for something “low risk”; in oral evidence, DJB maintained that she never asked B what the cautions were for. DJB said that the reason she did not pass on the information about the cautions to the fostering agency was that she wanted B to “tell the story” himself (it was not her story to tell, as she put it in her 1 March 2022 response to the social worker’s report).

17. In that letter, DJB said she knew about “the caution” (with no date as to when); whereas in her (later) written representations to DBS, she said she didn’t know about the cautions until late October 2021 – and that she had wanted to tell the fostering agency about them, but they kept “putting her off”.

18. DJB said that she had been eager for the fostering agency to “check” B and that she had sent them emails to this effect; she said she could not produce those emails because they were on the ‘egress’ email system, which she could not now access. DJB contended that the fostering agency were to blame for the unfortunate way that C’s placement with her ended (because they should have “checked” B earlier).

19. In some of her written representations to the Upper Tribunal, DJB emphasised that B had been not convicted of anything, was not legally represented at the time of the caution for the indecent image sent to a 13-year-old girl, and that B had mental health difficulties that could have contributed to that incident.

*B’s overnight stays at DJB’s home and arrangements for parking his vehicles*

20. DJB said that the only times B stayed overnight were the two nights in September, (when B had just left his other partner); and the time he slept on the sofa on 10 January 2022; DJB said that B stayed safely away from C. DJB said that B’s van was parked overnight outside her house because B couldn’t leave it at his work place, as it was dangerous; and his car was parked there during the day (as he drove his car to pick up the van).

21. Whilst the documentary evidence (including from DJB, such as her 1 March 2022 response) presents her relationship with B as romantic in nature, DJB’s representation to the Upper Tribunal of 17 March 2024 sought to characterise it as more a “friendship”, emphasising the difficulty of progressing a romantic relationship in circumstances where DJB was a foster carer for C.

**Summary of DBS’s case**

22. DBS adduced no new evidence at the hearing and submitted, in high-level summary, that there was no material mistake of fact or law in the decision.



**Discussion: did DBS make mistakes of fact or law in the decision?*****Factual mistakes in DBS's core findings?***

22. It is convenient, and (in our view) logical, to look at core findings 2 and 3 first, as they are the more specific of the findings, and then to discuss core finding 1, which is more general in nature.

***Core finding 2 (the DJB did not disclose B's two convictions for sexual offences)***

23. It is common ground that DJB did not tell the fostering agency about B's cautions; rather, they were discovered in mid-January 2022 as part of the "viability assessment" of B at that time. To that extent, there is no challenge to this core finding. DJB does, however, dispute this factual finding in two respects:

- a. first, she says that she did not know what the cautions were for, until some time in mid-January 2022. Documentation of the events of mid-January 2022 by the fostering agency indicate that B contended that DJB did know what the cautions were for. It seems to us, on the balance of probabilities, that DBS did not make a mistake in implying in this core finding that DJB knew that the cautions were for sexual offences: it seems implausible that B would have told DJB of the cautions, and that the conversation would have stopped there – and even if that were the case, in our view DJB had what is sometimes called "Nelsonian" knowledge that the cautions were for sexual offences i.e. the only reason she did not press B for full details, is that she knew, or highly suspected, what the answer would be, and that it would be troublesome for her (and that is the only reason she did not press him for the full details).

(A classic explanation of "Nelsonian" knowledge of this kind is in *Manifest Shipping Company Limited v Uni-Polaris Shipping Company Limited and Others* [2001] UKHL 1 at [112], where Lord Scott said:

'Blind-eye' knowledge approximates to knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground - and if it is not, it should be - that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence. Lord Blackburn in (1877) 2 App Cas 616, 629 distinguished a person who was "honestly blundering and careless" from a person who "refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind - I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover". Lord Blackburn added "I think that is dishonesty");

- b. in our view, it is because DJB knew that the cautions were for sexual offences (i.e. for something with potentially serious implications for her role as C's foster carer), that she was keen for the foster agency to "check" B and, if necessary in the course of that, for B to "tell his own story";

- c. second, DJB says that these were not convictions, as the core finding says, but rather cautions. We agree that DBS made a mistake in referring to them here as “convictions” rather than “cautions” – however, this is not in our view a “material” mistake i.e. one that made a difference to the outcome (the decision to include DJB in the barred lists). This is because, in the context of safeguarding children and vulnerable adults, a caution for sexual offences is, in and of itself, undoubtedly relevant information.

24. We therefore find no material mistake of fact in core finding 2.

*Core finding 3 (the DJB was deceptive re: B by breaching statement of expectations re: spending the night at DJB’s home, being present when C there, length of relationship, and how long DJB knew about conviction)*

25. This core finding contains a mistake, in that the written statement of expectations as between DJB and the fostering agency was not signed until 18 January 2022 i.e. just about the time when DJB stopped fostering. Again, however, we find this to be an “immaterial” mistake i.e. one that did not affect the outcome, since (we find) the expectations about the matters in this core finding were established, as between DJB and the fostering agency/supervising social worker, prior to the signature of that document, via conversations and emails between them over the course of 2021 (and, in particular, those that followed DJB telling the social worker about her new relationship with B in February 2021, and those in and following September 2021, when DJB told the agency that the relationship had restarted).
26. As regards expectations about B staying overnight at DJB’s house when C was at home, we are satisfied that DJB understood, from February 2021 (and this was reinforced in September 2021) that B was not to stay overnight, pending a “viability assessment” to be carried out by the fostering agency. There is no dispute that this expectation was breached three times – when B stayed overnight for two nights in September, and for a further night in early January 2022. DJB contends that this was the full extent of B’s overnight stays. We are not persuaded. We consider it likely, in all the circumstances, including evidence of B leaving clothing at DJB’s house and regularly parking outside it, that B also stayed overnight on other occasions, with some regularity, although we cannot, on the evidence, assign further precise dates. We are satisfied that DBS did not make a mistake in finding that this expectation had been breached. Nor was it a mistake for DBS to find that DJB was “deceptive” in the sense of trying to hide the frequency of B’s overnight stays from the fostering agency and supervising social worker: we note (1) that the 10 January 2022 overnight stay was only discovered as a result of an “unannounced visit”; and (2) as we have found, B’s overnight stays were more frequent than the three occasions DJB admitted to the fostering agency.
27. As regards expectations as to when, and for how long, the relationship with B was going on, we have found that DJB told the fostering agency in March 2021 that the relationship had ended – yet, even though it restarted in April, DJB did not tell the social worker this until September. Accordingly, in our view DBS did not make a mistake in finding that DJB had been less than open with the fostering agency on this matter: she kept the information from them, even though she knew it was relevant to her fostering.

28. As regards expectations as to telling the fostering agency about B's cautions for sexual offences – we have found, above, that DJB knew about these, yet did not inform the fostering agency. Again, in our view DBS did not make a mistake in finding that DJB had been less than candid with the fostering agency about this matter; she kept the information from them, even though she knew it was (highly) relevant to her fostering.

29. We therefore find no material mistake of fact in core finding 3.

*Core finding 1 (the DJB did not sufficiently safeguard C by adhering to expectations re: B, which caused end of placement and distress to C)*

30. Breaking down this core finding:

- a. we have made findings above (regarding core finding 3) about DJB's breaching expectations with the fostering agency as regards her relationship with B;
- b. there is no dispute that these breaches caused the fostering agency to end the placement;
- c. equally, there is no dispute that ending the placement caused distress to C;
- d. the key area of contention (apart from the arguments around what expectations were breached, which we have already given our conclusions on) is whether those breaches indicated that DJB did not sufficiently safeguard C.

31. DJB argues that she did sufficiently safeguard C; in particular, that she never left C alone with B; and that, in other respects, she was a good foster carer. She also argues that, whilst she did not tell the fostering agency about B's cautions for sexual offences, she repeatedly asked the agency to "check" B (such that, presumably, those offences would have come to the fostering agency's attention earlier).

32. In our view, DBS did not make a mistake in finding that, by failing to tell the fostering agency about B's cautions for sexual offences, and letting B stay overnight at her home on a number of occasions, DJB did not sufficiently safeguard C. The fostering agency was "in the dark" as regards the serious potential risk to C's safety posed by someone who had cautions for sexual offences, one involving a child of C's age; it was a situation that ought not to have persisted, from a safeguarding point of view i.e. the fostering agency should have been informed. We accept that DJB was keen for the fostering agency to "check" B and, periodically, asked them to do this; however, that does not render this core finding "mistaken" – as we have said, from a safeguarding viewpoint, DJB should simply have imparted the relevant information to the fostering agency; it was not sufficient, in the circumstances, to stop short of this, and just encourage them to undertake "checks" that might bring that information to their attention.

33. We therefore find no material mistake of fact in core finding 1.

### ***DBS's other factual findings***

34. DBS's other factual findings, for the most part, echo (i.e. do not materially add to) DBS's core findings. However, some of the findings summarised at paragraph 4v e. above – that DJB placed her needs above C's, and that DJB considered only

herself – go further, and were especially hurtful to DJB, who maintained that she always did her best for C. In our view, it was a mistake to find that DJB considered only herself – she clearly did consider C, and was trying to do her best in a complicated personal situation. However, we do not consider this to be a finding that was material to the decision – it is clear enough, given the core findings DBS made, that it would have included DJB in the lists even if it had found that DJB considered C as well as herself. For completeness, we do not consider that DBS made a mistake in finding that DJB put her needs above C’s – however, it is an “academic” point, as this, too, was not a “material” factual finding. In short, the material factual findings for this decision were DBS’s core findings.

***Mistake on a point of law?***

35. We find no mistake on a point of law in the decision. In particular, given DBS’s core findings, which included a failure to disclose cautions for sexual offences in respect of someone being given access to a home with a foster child – clearly, a serious matter from a safeguarding point of view – we do not consider it disproportionate, in law, to have included DJB in the barred lists:

**Conclusion**

36. The decision involved no mistake either in a factual finding on which it was based, or on a point of law. The decision is therefore confirmed.

**Zachary Citron  
Judge of the Upper Tribunal**

**Matthew Turner  
Suzanna Jacoby  
Members of the Upper Tribunal**

Approved for release on 31 May 2024