



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

**UPPER TRIBUNAL CASE No: UA-2023-000975-V
[2024] UKUT 246 (AAC)
VA v DISCLOSURE AND BARRING SERVICE**

THE UPPER TRIBUNAL ORDERS that:

No one shall, without the consent of the Upper Tribunal, publish or reveal the name or address of any of the following:

- (a) VA, who is the Appellant in these proceedings;**
- (b) DS and any other person mentioned in the documents or during a hearing;**

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

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Decided following an oral hearing on 5 August 2024.

Representatives

Appellant	Libby Anderson of counsel, instructed by Olliers Solicitors Ltd
Disclosure and Barring Service	Andrew Webster of counsel, instructed by DLA Piper UK LLP

DECISION OF THE UPPER TRIBUNAL

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

DBS Reference: 00991500171
Decision letter: 4 April 2023

UPPER TRIBUNAL CASE No: UA-2023-000975-V
[2024] UKUT 246 (AAC)
VA v DISCLOSURE AND BARRING SERVICE

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. DBS's decision is confirmed.

REASONS FOR DECISION

A. History and background

1. On 4 April 2023, DBS included VA in both the children's barred list and the adults' barred list in respect of its finding that:

You shouted at a resident [DS] and ignored her requests for help with her pain on 08/07/2022 and failed to accurately report and record the incident.

Upper Tribunal Judge Jacobs gave VA permission to appeal on 24 November 2023. He identified these grounds:

First: did DBS make mistakes in its findings of fact that (a) DS was in pain and calling for help and (b) VA was required to report and record the incidents? These mistakes are based on the assertion that DS was masturbating.

Second: did DBS make a mistake of law in that its decision was disproportionate?

2. The judge directed an oral hearing of the appeal, which took place before us on 5 August 2024.

B. The legislation

The barring provisions

3. We set out the provisions of Schedule 3 SVGA relating to children; those relating to vulnerable adults are essentially the same. Paragraph 9 is the equivalent for vulnerable adults.

Behaviour

Paragraph 3

(1) This paragraph applies to a person if—

(a) it appears to DBS that the person —

(i) has (at any time) engaged in relevant conduct, and

(ii) is or has been, or might in future be, engaged in regulated activity relating to children, and

(b) DBS proposes to include him in the children's barred list.

(2) DBS must give the person the opportunity to make representations as to why he should not be included in the children's barred list.

(3) DBS must include the person in the children's barred list if—

(a) it is satisfied that the person has engaged in relevant conduct,

UPPER TRIBUNAL CASE No: UA-2023-000975-V
[2024] UKUT 246 (AAC)
VA v DISCLOSURE AND BARRING SERVICE

- (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.
- (4) This paragraph does not apply to a person if the relevant conduct consists only of an offence committed against a child before the commencement of section 2 and the court, having considered whether to make a disqualification order, decided not to.
- (5) In sub-paragraph (4)–
 - (a) the reference to an offence committed against a child must be construed in accordance with Part 2 of the Criminal Justice and Court Services Act 2000;
 - (b) a disqualification order is an order under section 28, 29 or 29A of that Act.

Paragraph 4

- (1) For the purposes of paragraph 3 relevant conduct is–
 - (a) conduct which endangers a child or is likely to endanger a child;
 - (b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
 - (c) conduct involving sexual material relating to children (including possession of such material);
 - (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
 - (e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate.
- (2) A person’s conduct endangers a child if he–
 - (a) harms a child,
 - (b) causes a child to be harmed,
 - (c) puts a child at risk of harm,
 - (d) attempts to harm a child, or
 - (e) incites another to harm a child.
- (3) ‘Sexual material relating to children’ means–
 - (a) indecent images of children, or
 - (b) material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification.
- (4) ‘Image’ means an image produced by any means, whether of a real or imaginary subject.
- (5) A person does not engage in relevant conduct merely by committing an offence prescribed for the purposes of this sub-paragraph.

UPPER TRIBUNAL CASE No: UA-2023-000975-V
[2024] UKUT 246 (AAC)
VA v DISCLOSURE AND BARRING SERVICE

(6) For the purposes of sub-paragraph (1)(d) and (e), DBS must have regard to guidance issued by the Secretary of State as to conduct which is inappropriate.

The appeal provisions

4. Section 4 SVGA contains the Upper Tribunal's jurisdiction and powers.

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

UPPER TRIBUNAL CASE No: UA-2023-000975-V
[2024] UKUT 246 (AAC)
VA v DISCLOSURE AND BARRING SERVICE

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

...

C. About VA

5. VA was born in 1974 and has provided care for vulnerable adults in a variety of roles and contexts over 21 years. In 2022, she was a Senior Care Assistant at a residential home where she had been employed since March 2019. She also volunteered with her local church's youth team and, during the pandemic, provided support to the elderly in the community.

6. VA has numerous qualifications: a BSc in Health and Social Care; City and Guilds Diploma Level 3 in Adult Social Care; NVQ Level 3 in Social Care; Level 1 award in Understanding Customer Service; Level 3 award in Education and Training; Level 2 award in Mental Health; Level 2 award in Counselling (listening skill); and Certificate in Assessing Vocational Achievement. No doubt, she has also attended numerous training sessions on the whole range of topics relevant to the work she had undertaken in her different roles.

7. It is an important feature of this case that VA does not feel comfortable talking about masturbation and avoids using the word, preferring to say 'fingering' or 'scratching'. Her feelings are based on her religious belief.

D. About DS

8. At the time, DS was 79 years old. According to VA, she did not have dementia and had capacity. We have a copy of her care plan dated 17 May 2022. VA told us that there had been a more recent plan by the time of the incident in July 2022. That would be in accordance with normal practice. She had some allergies and type 2 diabetes, and was prone to skin infections. There is also reference to medication for pain. She enjoyed masturbating, although she was prone to doing so when in view of others. The incident on 8 July 2022 occurred when VA came to DS's room and found that she was masturbating in front of a mirror.

E. The evidence

The recording

9. The principal evidence against VA consists of a voicemail message left on the telephone of a district nurse. VA was working on the 8pm to 8am shift on 7/8 July 2022. She was carrying a work phone in her pocket. Somehow pressure was applied, causing the phone to ring the last number dialled, which was that of the district nurse. The call went to voicemail. This happened three times in all, at 01:13, 01:18 and 01:20. When the nurse heard the messages, she reported them to the police, who identified the number from which the calls came and the person who had been carrying the phone at the time.

10. The police listened to all three calls and made a copy of the earliest. They did not copy the other calls because they were unclear and of no evidentiary value. VA has complained that the other calls might have contained evidence that provided context to the first call. In particular, she said that one of the calls might have caught a later

UPPER TRIBUNAL CASE No: *UA-2023-000975-V*
[2024] UKUT 246 (AAC)
VA v DISCLOSURE AND BARRING SERVICE

conversation in which DS apologised to VA for how she had behaved. The reality, though, is that there are no copies of the other calls.

11. We have a copy of the recording and have listened to it, individually and collectively, numerous times. We also have VA's note of the recording. The bold passages are VA's comments that set the context. The rest is a partial transcription of what was said by VA and DS. It is not complete. There are exchanges or occasional words and phrases that we have been able to hear, but were not included. There are also parts that are unclear, as a result of VA and DS talking over each other. We have already mentioned VA's reluctance to talk about masturbation, which is why she is referring to scratching.

12. We now set out VA's note. We have made an addition in brackets, with an approximate time on the recording. Some of the remarks are repeated more often than VA has transcribed.

VA walks into DS's room and there she was, standing by the mirror in her shower room, with her fingers in her vagina rubbing and moaning.

VA: DS when you are done, when you are finished you let me know. I am here waiting.

DS: I want help.

VA went into the Bathroom, DS looking at me on the mirror continued.

VA: you want help with what? Help with what? Help with the nonsense you are doing. DS you are doing what you like to do so carry on.

DS: I don't know what you are talking about.

VA: DS when you are done let me know!! When you are done with this nonsense.

DS: I am done, I am done, you are not leaving though.

[DS at 0.50: VA I am bleeding like billy-o.]

DS continued rubbing and scratching her vagina while standing in front of the mirror.

VA: What do you mean you are done; you're scratching when you finish scratching you let me know.

DS: No, no, don't my crotch is paining.

DS reached out and grabbed my hand, pulling it towards her

VA: Don't grab me, Good, You did it, you can stop it, what do you want me to do.

DS: wait, wait!! While I Wash myself, I am just washing myself.

Meanwhile DS was still in front holding my hand with her left hand and right hand still on her vagina.

VA: Good!!you are able to wash yourself, yes? You wash yourself.

DS: I want you to help me, I am in pain, I just don't know what to do

UPPER TRIBUNAL CASE No: *UA-2023-000975-V*
[2024] UKUT 246 (AAC)
VA v DISCLOSURE AND BARRING SERVICE

VA: There is nothing I can help you do. you scratch yourself to bits, and you are telling me to help you. What do you want me to help you with?

DS then took her right hand out and held my uniform

DS: I didn't know what I was doing.

VA: DS you know what, stop this nonsense, you know what you are doing, you don't have dementia, you have capacity, you want to scratch, scratch, if you see blood that is your problem, so don't call me, what are you holding me for.

DS: I go out, I go out.

DS then walked out of the bathroom and went to her bed side.

VA: what do you really want, you do what you like to do, what are you calling me for? Are you calling me to come and scratch with you or what?

DS: No, no I am in pain, I am in pain.

VA: You are in pain because you want to be.

DS: That's alright then, isn't it?

VA: It is, you are still scratching.

13. That was VA's note. There are references in the evidence to another transcript of the recording. Mr Webster argued that this was a false impression caused by the inappropriate use of language. At best, he suggested the document referred to as a transcript was an email from the police, which contained some words used by VA in the recording. We are satisfied that there was a transcript. We rely on the record of the investigation meeting on 15 July 2022 (pages 125-126). The interviewer 'read out the transcript' and then asked VA questions as she 'read transcription line by line'. Then she 'played the voicemail transcript'. VA says 'Oh Jesus' as 'transcript played on laptop.' Later, the interviewer 'handed a copy of transcript back to VA'. We accept Mr Webster's point that some of the language seems to confuse recording and transcript, but we find confirmation for our view in the judgment of the employment judge who dismissed VA's claim for unfair dismissal. The judge wrote:

13. ... The police provided a typed-up transcript of the recording which appeared within the bundle. ... The claimant raised issues over the accuracy of the transcript and she provided her own typed up transcript. Both versions of the transcript provided commentary over and above that which was actually said.

14. The existence of a transcript was relevant in argument because of the evidence that certain words were or were not heard on the recording. There is disagreement whether DS said she was 'frightened' and whether VA called DS 'stupid' or just told her to 'stop it'. In the end, we have decided to rely on what we are able to hear on the recording. Having taken account of the recording as a whole, our conclusions do not depend on whether the disputed words were used or not.

15. We need to say something about the manner in which VA spoke to DS. VA was dismissed on 3 August 2022 for being 'aggressive toward the service user' (page 161). That is not directly in point for us, but VA's voice does rise and fall during the recording. The same happened during the hearing before us. We also note that VA was told to 'stop raising your voice' during the investigation meeting (page 126). At times on the recording, VA spoke over DS and her voice was loud enough to prevent us hearing

UPPER TRIBUNAL CASE No: UA-2023-000975-V
[2024] UKUT 246 (AAC)
VA v DISCLOSURE AND BARRING SERVICE

what DS was saying. Our conclusion is that the tone, pitch and volume of VA's voice reflected the intensity of her feelings and reactions to what was happening. Almost from the start, we heard a mixture of distaste, irritation and annoyance with what DS was doing. We also heard, quite properly, insistence that VA was not going to be drawn into helping DS masturbate.

Other evidence

16. The incident did not stop when the voicemail message ended. VA told us that DS went to her bed and VA helped her into bed. Before VA left the room, DS apologised to VA, who said it was OK and put the whole episode behind her.

17. DS was spoken to by the general manager and the police. It is difficult to know what to make of what DS said to them. The only conclusions we can draw are: (a) she did not criticise VA; (b) some remarks could refer to the incident – she said all she wanted was a cuddle; and (c) DS may have been thinking of other incidents or occasions – certainly some of the things she said cannot relate to the incident before Upper Tribunal.

18. Finally, DS did not make any complaint about VA's behaviour, no painkillers were administered during the shift, and no sign of bleeding was noted in the records. Those records were concerned with effects of incontinence, so the staff would not have carried out vaginal examination.

F. Did VA ignore DS's requests for help with her pain?

19. We find that VA did.

20. VA found DS masturbating. Her immediate reaction was focused on that. Whatever DS said, VA reacted on her perception of the situation. She was not open to the possibility that there might be something more going on. She interpreted what DS said in the light of her perception and reacted accordingly. Almost immediately – probably as soon as she realised what DS was doing - her tone showed her irritation and her language was dismissive, referring to masturbation as 'nonsense'. She did not show any sign of trying to engage with what DS was saying, no sign that she questioned her initial perception. DS was trying to convey a message that VA was resistant to hearing. VA's focus on herself intensified when DS grabbed her and tried to involve her in masturbating, and more so when she took hold of VA with her right hand, the one she had been using to masturbate.

21. What was the message VA was trying to convey? We accept VA's point that she did not have to take the use of the word 'pain' in isolation. She had to take what DS said as a whole. That is how we have interpreted what DS was saying, but the recording shows that VA did not try to understand what DS was saying in that way. There is no sign that she understood the message. DS said she was in pain. She persisted with this, repeating herself, almost as if she was arguing with VA to try to convince her. She said that she wanted help and that she did not know what to do. And she said she was 'bleeding like billy-o.'

22. VA told us that she was aware that DS was someone who would complain. She was aware that DS had complained about another carer, saying that he had applied cream into her vagina rather than on her thigh. What we heard on the recording was

not someone taking a cautious approach in order to avoid any cause for DS to make a complaint.

G. Was VA required to report and record the incident?

23. DBS found that VA had failed to accurately report and record the incident. VA did not report the incident. Whether that amounted to a failure depends on whether she was under a duty to record and report what happened.

24. We accept and find that VA set out accurately what the staff had been told in her witness statement for the hearing:

23. DS's behaviour was reported to managers at the care home but management failed to put measures in place. They also failed to update DS's care plan in that her sexual behaviour had changed. Instead, there was a staff meeting where the Line Manager told all staff that DS had full capacity on the issue of pleasuring herself and staff were to respect her decision to do whatever she wanted with her body. We were also told that if staff found DS in her room pleasuring herself, to leave her alone and if they found her in a public area of the care home pleasuring herself, to find something to cover her and take her to her room. We were told that any incidents of DS pleasuring herself were not to be discussed between staff. This guidance was only verbal and was the reason why none of the staff recorded any instances of DS masturbating on the Prognote note system. DS masturbating was not regarded as 'distressed behaviour'.

25. We do not, though, accept VA's evidence that she was not required to record or report the incident on 8 July because it involved masturbation. The managers were telling the carers to respect DS's privacy and that masturbating was not of itself something that needed to be recorded. We do not accept that the managers told the carers not to record anything involving masturbation.

26. We have made that finding for the following reasons.

27. First, VA did not mention this guidance until her witness statement for the hearing, which she signed on 29 July 2024. When she was asked during the investigation meeting why she did not report what happened (page 126), her answer was that she had forgotten and been distracted by two urgent incidents. She said the same during the disciplinary hearing on 1 August 2022 (page 158), saying she would have 'done a distressed behaviour' report if she had gone back to her desk. The most obvious response for VA to make to the questions was surely that she had been told not to record it. Instead, she said twice that she had been distracted and forgot, even adding that she would otherwise have made a record.

28. VA told us that she was not able to concentrate on the questions. She told us that she was still grieving the loss of her father earlier in 2022. She had also been told that the investigation would relate to something that happened on 8 June. She was only told the correct date (8 July) at the start of the investigation meeting. Despite the effect those points would have on her mental state, which we do not underestimate, her answer would have been instinctive if she had understood the guidance in the way she now claims.

29. Second, no one involved on the management side in the investigation and disciplinary process mentioned it. As with VA, they would have been aware of this guidance if it had been given.

30. Third, it is improbable that managers would give such guidance in view of DS's propensity to complain and make allegations. Respecting DS's privacy was one thing, what happened in the early hours of 8 July was something very different. DS was masturbating, but she was also expressing that she was bleeding and in pain, and she was asking for help. She was also trying to involve a carer in assisting her to masturbate. Both were serious matters that the managers and other carers had an interest in knowing about in order to give DS the care she needed and to protect the staff from false allegations.

31. Fourth, if the managers had told staff not to talk among themselves about DS masturbating, VA's own evidence showed that word was spreading. In her witness statement for the hearing, she said:

22. It was common knowledge that in the weeks leading up to the alleged incident, DS was seen by ... staff on numerous occasions with her hand in her private parts, scratching and moaning in pleasure. DS would not stop until she was satisfied.

H. Proportionality

32. Ms Anderson argued that DBS's decision was disproportionate and therefore in error of law. This is how she identified the relevant considerations in her skeleton argument:

- a. The facts as asserted by the Appellant's witness statement.
- b. The police did not identify any criminal offence and were content for the matter to be dealt with internally [94].
- c. The barring list is a method of last resort. It would be disproportionate to ban someone for conduct of this nature, when that conduct, even taken at its highest, could be remediated through training and supervision.
- d. This incident took place over two years ago and is an isolated historic allegation. The internal investigation notes 'this appears to be a single incident, no pattern of incidents identified [...] there are no indications of escalating risk [...] a crime does not appear to have been committed [...] there are no known indications of intent [...] there are no indications of coercion or control' [106].
- e. The service user herself stated that she didn't think anyone had done anything bad enough to be 'thrown out' i.e. to lose their job [107]. This also suggests that the service user had not, in fact, suffered emotional harm as a result of the Appellant's actions (although there was the potential for harm). This is also accepted by the DBS [217].
- f. This incident was not deemed serious enough for referral to a Safeguarding Adults Board/Safeguarding Adults Review under s44 of the Care Act 2014, because the criteria for such a referral was not met [112]. The relevant criteria in section 44 are stated as 'reasonable concern about how persons with relevant functions worked together to safeguard the adult' and knowledge or suspicion that 'the adult has experienced serious abuse or neglect'.

UPPER TRIBUNAL CASE No: UA-2023-000975-V
[2024] UKUT 246 (AAC)
VA v DISCLOSURE AND BARRING SERVICE

g. The Appellant has provided several positive character references which speak to her experience and ability as a care professional [22, 23, 24, 193, 194, 195]. She is described as honest, selfless, empathetic, compassionate and knowledgeable. There is also a screenshot of positive feedback from the son of a service user, describing the Appellant as having gone 'well beyond usual expectations' and describing her as 'epitomising the commitment of staff to residents' welfare' [187]. She is clearly very highly thought of by managers, colleagues, and service users.

h. The Appellant has reflected upon what happened, apologised and expressed remorse on multiple occasions [18, 171, paragraph 37 of witness statement]. She has reflected on the potential impact on the service user and is remorseful for this, not merely on her own account as suggested by the DBS [232].

i. She is an experienced and highly qualified individual who has sought out additional training and qualifications improve her own performance and the performance of her colleagues, for example, she achieved a BSc in Health and Social Care from London Metropolitan University in 2016 (paragraph 3 of witness statement).

j. At the relevant time, the Appellant was struggling in the aftermath of a bereavement [199]. The loss of her father had come as something of a surprise to her because she had not been made aware that her father was even unwell. The Appellant has fully addressed her issues, putting coping strategies in place, and has developed a deep level of insight into the potential safety issues that arose, and into the impact of her personal issues upon her work. This insight minimises or even negates any risk of repetition. The decision did not take account of this and of the Appellant's reflection and the personal progress she has made.

k. Including the Appellant on the ABL and CBL has a profound and disproportionate effect upon her because it prevents her from following not only her career of choice, at which she had previously been successful, but also precludes her from working in many other jobs for which employers require DBS checks even though they do not constitute regulated activity for the purposes of the Act. This has had a very significant financial impact upon the Appellant.

33. We make these comments on those considerations:

- As to (a), we have not accepted the facts as asserted by VA.
- As to (b), we accept that there was no prosecution.
- As to (c) and (f), we do not accept that barring is a 'last resort'. It is required when the statutory requirements are satisfied. The legislation does not contain a 'last resort' test. The same is true of the application of the Care Act 2014. DBS has to apply the statutory rules for the regime it operates. There was no evidence given that VA's conduct could be remediated by training or supervision. We would have needed evidence given that the cause of what happened is deeply embedded in VA's faith.
- As to (d), we accept that this is an isolated incident, but it is important to remember that VA has over two decades of experience, is well qualified and properly trained. Despite that, the incident still occurred. That speaks of the

UPPER TRIBUNAL CASE No: UA-2023-000975-V
[2024] UKUT 246 (AAC)
VA v DISCLOSURE AND BARRING SERVICE

strength of the underlying causes. They are not confined to this particular incident. There is still the risk of repetition.

- As to (e), we accept that DS said this, but it is not clear whether she had in mind the incident we have to consider.
- As to (g) and (i), we accept the references as genuine and sincere. We do not wish to belittle VA's qualities or achievements, but the references do not tell the full story.
- As to (h), we accepted that VA has expressed remorse and reflected on her behaviour, but in a jurisdiction that protects children and the vulnerable, it would take time and evidence that we have not seen to show that VA has overcome the intensity of her feelings, even revulsion, that we heard on the recording.
- As to (j), we accept this.
- As to (k), we accept that these are the consequences of including VA in the barred lists. They will inevitably be present in almost, if not every, appeal.

34. The Court of Appeal has decided that it is not for us to undertake the assessment of appropriateness, which includes VA's Convention right to a private and family life: see *B v Independent Safeguarding Authority (Royal College of Nursing intervening)* [2013] 1 WLR 308 at [14]-[24]. The Court adopted this analysis of that right:

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?

35. The aim of protecting children is of sufficient importance to justify limiting VA's Convention right under Article 8 (question (a)) and barring her from working with children is rationally connected with that aim (question (b)). That leaves two questions: is barring no more than necessary to accomplish that aim and does it strike the right balance?

36. We do not accept that the points made by Ms Anderson, individually or collectively, show an error of law in DBS's decision. They make the points that can properly be made in her favour, but they have to be set in the context of the points to be made against VA. DBS relied on its findings of fact and its analysis of the underlying causes of the incident. We have dismissed the appeal on mistakes of fact, relying on our assessment of the evidence. With those facts still in place, we cannot find any error of law in the balance struck by DBS in its assessment of VA's Convention right.

**Authorised for issue
on 10 August 2024**

**Edward Jacobs
Upper Tribunal Judge
John Hutchinson
Rachael Smith
Members**