Neutral Citation Number: [2024] UKUT 052 (AAC) **Appeal No. UA-2022-001686-V**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

DAK

Appellant

- v -

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Wikeley, Mr Akinleye and Mr Graham

Hearing date: 7 January 2025

Representation:
Appellant: Ms L Herbert of Counsel
Respondent: Mr A Serr of Counsel, instructed by DLA Piper UK LLP

On appeal from:
DBS ID number: P0004K4IOVY
Customer reference: 00962639108
Decision Date: 21 September 2022

RULE 14 Order
The Upper Tribunal has made an order prohibiting the disclosure or publication of the names of certain individuals or any matter likely to lead members of the public to identify those individuals or the care agency concerned; see pages 226-228 of the Upper Tribunal bundle for details of these orders.

SUMMARY OF DECISION

KEYWORD NAME (Keyword Number)

65.1 Safeguarding Vulnerable Groups – children's barred list

Judicial summary

The Disclosure and Barring Service (the DBS) included the Appellant on both barred lists following an incident during the night shift at a care home, although her name was later removed by the DBS from the Children's Barred List. The evidence relied upon by the DBS was weak, much of it being untested second or third hand hearsay. The Appellant (and her shift leader) gave extensive oral evidence before the Upper Tribunal, which was tested under cross-examination. In the light of the fresh evidence before it, the Upper Tribunal found that the DBS had based its decision to bar the Appellant on material mistakes of fact. The Upper Tribunal directed the DBS to remove the Appellant's name from the Adults' Barred List.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the panel follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The First-tier Tribunal made mistakes in the findings of fact on which its decision was based. Pursuant to Section 4(6)(a) of the Safeguarding Vulnerable Groups Act 2006 ("SVGA"), the Upper Tribunal directs the Disclosure and Barring Service to remove the Appellant's name from the adults' barred list.

REASONS FOR DECISION

Introduction

1. This is an appeal by the Appellant against the decision by the Respondent ('the DBS') dated 21 September 2022 to include her on the adults' barred list. Originally the Appellant had also been included on the children's barred list, but her name was subsequently removed from that list with effect from 14 July 2023.

2. DBS's decision arose out of an incident that occurred on the night shift in a care home for individuals with severe autism and other serious disabilities. In short, the DBS case was that the Appellant, by her acts or omissions, had neglected one particular and highly vulnerable resident, in particular, by wedging a chair against his bedroom door so that he could not come out into the lounge. The Appellant's case was that the DBS's decision was fundamentally flawed and based on a series of mistakes as to the material facts (as well as being made in error of law). We allow the Appellant's appeal for the following reasons.

The two Upper Tribunal oral hearings

3. The Appellant's case was first listed for an oral hearing on 30 April 2024 before Judge Wikeley, Mr Graham and Dr Stuart-Cole. That hearing was adjourned after oral submissions by both counsel (Ms L. Herbert for the Appellant and Mr S. Lewis for the Respondent) and without any evidence having been heard. The panel was concerned, in particular, that there might be information or evidence in the DBS file relating to the Appellant's co-worker Mrs A, who had been involved in the same incident, that should properly have been the subject of disclosure in the present appeal proceedings. The DBS subsequently disclosed certain documentation from Mrs A's case file that related to the same incident.

4. We then held an all-day oral hearing of the appeal on 7 January 2025. In the event Dr Stuart-Cole was unavailable on this occasion, so the case was heard

entirely afresh (and, as noted, no evidence had been heard on the first occasion) by Judge Wikeley, Mr Graham and Mr Akinleye. We heard oral evidence for over two hours from the Appellant who was represented by Ms L Herbert of Counsel. We also heard extensive live evidence from the Appellant's shift leader on the night in question, Mr O. The DBS was represented by Mr A Serr of Counsel, instructed by DLA Piper UK LLP. We are indebted to both counsel for their skeleton arguments and oral submissions. We summarise first the legislative framework and the relevant case law authorities on the role of the Upper Tribunal in hearing such appeals.

The statutory framework

5. The DBS decision to include the Appellant on the adults' barred list was made under paragraph 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ('the SVGA'). This provides that the DBS must include a person in the adults' 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 vulnerable adults, and

    c. it is satisfied that it is appropriate to include the person in the list.

6. Under paragraph 10, "relevant conduct" for the purposes of paragraph 9 includes conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult; and a person's conduct "endangers" a vulnerable adult if he (amongst other things):

    a. harms a vulnerable adult or

    b. causes a vulnerable adult to be harmed or

    c. puts a vulnerable adult at risk of harm or

    d. attempts to harm a vulnerable adult.

7. Section 4(2) of the SVGA confers a right of appeal to the Upper Tribunal against a decision by DBS under paragraph 9 of Schedule 3 (amongst other provisions) but only on grounds that DBS has made a mistake on any point of law (section 4(2)(a)) or in any finding of fact on which the decision was based (section 4(2)(b)). However, the SVGA states 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)). In effect, therefore, issues of appropriateness are non-appealable.

The case law authorities

8. The authorities applicable to the Upper Tribunal's mistake of fact jurisdiction were recently and helpfully summarised by our colleagues in *AK v DBS* [2024] UKUT 408 (AAC) at paragraphs 33-41:

> 33. The relevant principles regarding factual mistakes have been set out in several recent decisions of the Court of Appeal (see *PF v DBS* [2020] UKUT 256 (AAC); *DBS v JHB* [2023] EWCA Civ 982; *Kihembo v DBS* [2023] EWCA Civ 1547; and *DBS v RI* [2024] EWCA Civ 95). These decisions are binding on the Upper Tribunal.
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> 34. In relation to whether it is "appropriate" to include a person in a barred list, the Upper Tribunal has only limited powers to intervene. This is clear from the section 4(3) SVGA and relevant case law. The scope for challenge by way of an appeal is effectively limited to a challenge on proportionality or rationality grounds. The DBS is well-equipped to make safeguarding decisions of this kind (*DBS v AB* [2021] EWCA Civ 1575 (paras 43-44, 55, 66-75)).
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> 35. At paragraph [55] of *DBS v AB*, the Court cautioned: "[The Upper Tribunal] 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…". At paragraph [43], the Court stated: "…unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity…, is a matter for the DBS".
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> 36. In the subsequent Upper Tribunal case, *AB v DBS* [2022] UKUT 134 (AAC), the Upper Tribunal decided (albeit in the context of a case that was based on the "risk of harm" rather than the 'relevant conduct' gateway) that *DBS v AB* meant that the Upper Tribunal could consider, on appeal under the SVGA, a finding of fact by DBS that an individual poses "a risk" of harm but not a DBS assessment of the "level of the risk posed" (see [49]-[52] and [64]).
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> 37. When considering appeals of this nature, the Upper Tribunal "must focus on the substance, not the form, and the appeal is against the decision as a whole and not the decision letter, let alone one paragraph…taken in isolation": *XY v ISA* [2011] UKUT 289 (AAC), [2012] AACR 13 (at [40]). 38. When considering the Barring Decision, the Upper

> Tribunal may need to consider both the Final Decision Letter and the document headed 'Barring Decision Summary' that is generated by DBS in the course of its decision-making process. The two together, in effect, set out the overall substantive decision and reasons (see *AB v DBS* [2016] UKUT 386 (AAC) at [35] and *Khakh v ISA* [2013] EWCA Civ 1341 at [6], [20] and [22]).
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> 39. The statement of law in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 indicates that materiality and procedural fairness are essential features of an error of law and there is nothing in the SVGA which provides a basis for departing from that general principle (*CD v DBS* [2020] UKUT 219 (AAC)).
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> 40. DBS is not a court of law. Reasons need only be sufficient/adequate. DBS does not need to engage with every potential issue raised. There are limits, too, as to how far DBS needs to go in terms of any duty to "investigate" matters or to gather further information for itself, but it must carry out its role in a way that is procedurally fair.
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> 41. If the Upper Tribunal finds that the DBS made a material mistake of fact or law under section 4(2) of the Act, it is required under section 4(6) SVGA to either (i) direct that DBS removes the person from the relevant list(s) or (ii) remit the matter to DBS for a new decision. Following *AB*, the usual order will be remission back to DBS unless no decision other than removal is possible on the facts

9. We would only add to that summary that in *DBS v RI* the Court of Appeal expressed some difficulty with certain aspects of the Court's earlier decision in *DBS v JHB*. For example, Bean LJ held as follows in *DBS v RI*:

> 32. Turning to the decision of this court in *JHB,* Ms Patry prays in aid the observation in [93] that "on the authorities a disagreement in the evaluation of the evidence is not an error of fact". But that must be read in the context of the statement in the previous paragraph that it was a case where the UT was looking at "very substantially the same materials as the DBS". In contrast with the present case, JHB had given very limited oral evidence, which did not have a direct bearing on the decision to place him on the lists (see paragraph [90] of the judgment, cited above). Elisabeth Laing LJ went on to say at [95] that "a finding may also be 'wrong' for the purposes of s 4(2)(b) if it is a finding about which the UT has heard evidence that was not before the DBS and that new evidence shows that a finding by the DBS was wrong, as the UT itself explained in *PF*."
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> 33. The *ratio* of *JHB* is difficult to discern, partly because this court found that the UT had erred in several respects any one of which might well have vitiated the decision. I venture to suggest that it may be authority for the proposition that if the UT has exactly the same material before it as was before the DBS, then the tribunal should not overturn the findings

of the DBS unless they were irrational or there was simply no evidence to justify the decision. The same rule may apply where, as in the *JHB* case itself, oral evidence is given but not on matters relevant to the decision to place the appellant on one or both of the Barred Lists.

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

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

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

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

10. Males LJ made observations to similar effect in *DBS v RI*:

> 49. In conferring a right of appeal in the terms of section 4(2)(b), Parliament must therefore have intended that it would be open to a person included on a barred list to contend before the Upper Tribunal that the DBS was mistaken to find that they committed the relevant act – or in other words, to contend that they did not commit the relevant act and that the decision of the DBS that they did was therefore mistaken. On its plain words, the section does not require any more granular mistake to be identified than that.
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> 50. That conclusion is reinforced in the light of the ability of the Upper Tribunal to hear oral evidence, as occurred in the present case. Parliament must have contemplated that an appellant would be able to give evidence to the effect that 'I did not do it'; that the Upper Tribunal would be entitled to evaluate that evidence, together with all the other evidence in the case; and that if the Upper Tribunal was persuaded accordingly, the appeal would be allowed, without the Upper Tribunal needing to find any other mistake on the part of the DBS. Of course, the evidence might not be believed, but if evidence stands up well to cross examination, that must be a factor which Parliament expected and intended the Upper Tribunal to take into account. It is inconceivable that Parliament intended to place the Upper Tribunal in a position where, having considered all the evidence and despite being satisfied that the finding of the DBS was wrong, the Upper Tribunal was powerless to allow an appeal, for want of being able to identify any other mistake made by the DBS apart from the fact that it had reached the wrong conclusion.
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> 51. In my judgment this follows from the terms of section 4(2)(b), and is also in accordance with the approach of the Upper Tribunal in *PF v DBS* [2020] UKUT 256 which, as confirmed in *Kihembo v DBS* [2023] EWCA Civ 1547 at [26], remains good law, despite what I would regard as the problematic decision of this court in *DBS v JHB* [2023] EWCA Civ 982. On behalf of the DBS, Ms Patry seized on a sentence in *PF* at [38] that 'It is not enough that the Upper Tribunal would have made different findings', but that sentence must be seen in the context of the decision as a whole, including the summary at [51] and the broad and general statement at [39]) that:
>
> > 'There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. …'
>
> 52. What then of the decision in *JHB*? It is not easy to discern the *ratio* of the decision, but it appears to have been along the following lines: (1) the only 'mistake' found by the Upper Tribunal 'was that the DBS had a mistaken view of the facts because the UT happened to differ from the DBS in its assessment of the same or very nearly the same materials' (see at [90]); (2) there is no 'mistake' by the DBS if it makes a finding which is open to it on the material before it ([93]); and (3) the proper approach of the Upper Tribunal to an appeal on

> a question of fact is as explained in cases such as *Volpi v Volpi* and *Subesh v SSHD* [2004] EWCA Civ 56, [2004] INLR 417 ([95]).
>
> 53. I would respectfully suggest that these cases are irrelevant to an appeal under section 4(2)(b) of the 2006 Act. They describe the approach of an appeal court which does not hear evidence for itself to a factual decision by a lower court which (usually but not always) has heard such evidence. But an appeal under section 4(2)(b) will generally involve the opposite situation, i.e. the DBS will have made a decision on the papers after considering written representations, while the Upper Tribunal is able to hear oral evidence. Moreover, the Upper Tribunal is the first independent judicial body to consider what will often be serious allegations against the barred person and its ability to determine the facts for itself (as distinct from whether those facts make it appropriate to include the person on the barred list, which is exclusively a matter for the DBS) is an important procedural protection (cf. *R (Royal College of Nursing) v SSHD* [2010] EWHC 2761 (Admin), [2011] PTSR 1193 at [102] and [103]).
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> 54. It may be, nevertheless, that *JHB* is binding for what it decides. I would respectfully suggest, however, that its *ratio* must be confined to cases where the Upper Tribunal either hears no oral evidence at all, or no evidence which is relevant to the question whether the barred person committed the relevant act – in other words, where the evidence before the Upper Tribunal is the same as the evidence before the DBS. That was the position in *JHB*, where Lady Justice Elisabeth Laing explained at [90] that 'the UT heard very limited evidence from JHB, for example, that he had not been interviewed by the police about the allegation on which finding 3 was based'; and that 'The UT does not seem to have heard much evidence which had a direct bearing on the matters on which the DBS relied in making findings 2 and 3, let alone any significant evidence'.
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> 55. *JHB* will not apply, therefore, when the appellant does give oral evidence. I accept Mr Kemp's submission that, when this happens, the evidence before the Upper Tribunal is necessarily different from that which was before the DBS for a paper-based decision. Even if the appellant can do no more than repeat the account which they have already given in written representations, the fact that they submit to cross-examination, which may go well or badly, necessarily means that the Upper Tribunal has to assess the quality of that evidence in a way which did not arise before the DBS.

11. The Court of Appeal's observations are especially relevant in the context of the present appeal, given that the DBS made the barring decision in respect of the Appellant on the basis of the documentary evidence alone, while we also had the benefit of hearing extensive live evidence. This is one of those cases where the cogency of the Appellant's live evidence has been critical to the successful outcome of the appeal.

The people involved in this case

12. In this decision we refer to the Appellant simply by refence to her status as such. We refer to the other individuals involved in this case as follows:

Mrs A:	The Appellant's co-worker
Mr B:	The care home's registered manager
Mr K:	Another support worker
Mr N:	The service user
Mr O:	The shift leader
Ms S:	The care home's regional manager/ operations manager

13. To ensure anonymity remains in place, where we have quoted from original source documents, we have replaced the various individuals' real names with the appropriate initials as detailed above. For the same reasons of ensuring anonymity, we refer to the Appellant's employer as simply 'the care home'.

The factual background

14. Although the particular circumstances of the incident that gave rise to the barring decision are very much in dispute, the wider factual context is not in issue and may be briefly summarised as follows. The Appellant was employed by the care home as a wake-in-night support worker at a 9-bed residential unit for service users with autism and severe learning disabilities. The unit comprised a series of self-contained flats. Mr N, the service user in question, had extremely complex needs, being largely non-verbal, so having severe communication difficulties, and suffering from tumours and sores on his body, resulting in significant pain management issues. As such, he liked to spend literally hours in the shower, and presented with highly challenging behaviours if he could not make himself understood. He needed monitoring at all times and his complex needs were such that he was provided with 2:1 support within the care home.

The DBS decision under appeal

15. The DBS made the barring decision based only on the documentary evidence. As is its wont, it did not hear live evidence either from the Appellant herself or from any other witness.

16. In its final decision letter, the DBS found the following composite allegation to be made out on the balance of probabilities:

- You neglected the care and wellbeing of vulnerable adult Mr N by knowingly restricting his movement by way of blocking his bedroom door to prevent access to the lounge, enabling you to intentionally sleep on duty.

Having considered this, DBS is satisfied you engaged in relevant conduct in relation to vulnerable adults. This is because you have engaged in conduct which endangered a vulnerable adult or was likely to endanger a vulnerable adult.

…

We are satisfied a barring decision is appropriate. This is because DBS are satisfied you neglected the care and wellbeing of vulnerable adult Mr N by knowingly restricting his movement by way of blocking his bedroom door to prevent access to the lounge, enabling you to intentionally sleep on duty. Despite the service user having a detailed care plan, highlighting his vulnerabilities and the high level of support he required due to the risks he faced because of his needs, you neglected to take this into account, and instead chose to lock him in his bedroom by way of placing a chair under the door handle so he could not leave, which enabled you to sleep on duty, undisturbed, sitting in a chair and putting a coat over your head.

17. Next, we summarise the grounds of appeal.

The Appellant's grounds of appeal

18. The Appellant's grounds of appeal were as follows:

That the Respondent has made material errors of fact in relation to this decision in that:

a) The DBS made findings that the Regional Manager made a statement and placed reliance on that evidence in making that decision, when no statement was obtained from the Regional Manager;

b) Made a finding of fact that the door was 'placing a chair under the door handle so he could not leave' when the evidence relied on was not consistent with this finding;

c) Made a finding that the Appellant had not explained why the door was 'wedged' when the evidence provided two different accounts from witnesses one stating 'wedged' and the other stating 'barricaded';

d) Made a finding of fact that the Appellant was asleep when there was no evidence to support this;

e) Made a finding that the Appellant had not provided an explanation for why the light was off when this explanation was provided.

And that the Respondent had made material errors in law in that:

f) The DBS has failed to undertake their duty to investigate in failing to request the contemporaneous written statements taken from the Appellant and Mrs A on the night of the incident which is clearly materially relevant and therefore have failed to take into account relevant evidence in reaching their conclusion;

g) Failed to complete the relevant parts of the SJP in relation to the 'Counter Indicators' for Cognitive Factors, Relationships, Behavioural Factors which come from the care home's Frontline worker report which has led to an error in their decision-making process and therefore an error in law;

h) Failed to attach any or sufficient weight to the Appellant's previous good character and practice.

The contemporaneous documentary evidence in this case

19. The contemporaneous documentary evidence relating to the particular incident in this case on 4 August 2021 is somewhat limited.

20. The care home's referral to the DBS, made just over a month later on 8 September 2021, was framed in the following terms:

> The nature of the allegation is that during the Night shift on the 04.08.2021 a night spot check was carried out. During this inspection. Staff were found to be asleep in a Service Users apartment. Staff had knowingly restricted the Service Users access by placing a chair under the door handle knowingly locking him into his bedroom while they both slept. The allegation was made by the operations manager and new Registered Manager in post during the night spot checking during the spot check on the 04.08.2021.

21. Mr B, the care home's registered manager, prepared a short 'investigation report' on 9 August 2021, running to just 2½ sides. In terms of methodology, Mr B explained that he had interviewed Mr O (the shift leader) and Mr K (a support worker) and reviewed their (one-page) handwritten statements. He did not speak to the Appellant or Mrs A because they had both resigned by that time. He had also had a Teams call with Ms S, the regional / operations manager (although there was no separate record or transcript of this call). The sum total of his

substantive review of the evidence was as follows (the syntax has been left as in the original text and uncorrected):

> I undertook a teams call with the Operations Manager Who provided a factual concise account of events from the time of arrival, waiting for the new manager to arrive, there was a delay of the new manager arriving. Operations manager states that she observed from the outside of [the care home] that the office lights were off. Mr O Stated in his investigation meeting that the lights were off because of his eyes itching due to hay fever. Mr K admitted to having cushions on the floor this was due to a sore back. Mr O confirmed That the operations manager asked him to do a walk around with her, it was confirmed that they went into the courtyard and into the first flat. On entry to the flat there was a member of staff on the sofa, and another member of staff in the chair with a coat over her face, this was confirmed in carer 1 [the Appellant's] statement by her own omission. The Service User was restricted to his bedroom only with a chair wedged under the outside of the bedroom door handle depriving the Service user of a liberty. Mr O states that he checked the team every 30 minutes and had identified no concerns at all.

22. It will be evident that this brief consideration of the evidence is as much concerned with the conduct of Mr O and Mr K as that of the Appellant and her co-worker Mrs A. The penultimate two sections of the report (before the recommendation that the matter be referred to the DBS) then read as follows (again, without any textual corrections):

> **4. Summary of finding statements**
>
> Having looked at the statements provided I believe that it is beyond doubt that the staff had knowingly deprived a Service User of their liberty, this has also been found in one of the carer 1 statement. Leading to an infringement of the Service Users Human Rights
>
> **5. Conclusion**
>
> Appendices 1 and 1A openly admit to restricting access and depriving a Service user of their liberty. (Carer 1) in her statement openly admits to sitting in the chair with a coat over her face. Therefore, the investigation and statements provided evident that it is highly likely that the staff were asleep on shift when they were aware of their duty being an awake night.
>
> Carer 2 denies being asleep, however in the statement acknowledges that they were laying on the sofa resting. Both staff have robust training regarding safeguarding, Mental capacity act and deprivation of liberty safeguarding. Therefore, they knowingly deprived a Service of

> their liberty, and infringed upon their human rights this was to ensure that they were able to have an easy shift with no interruptions enabling them to sleep.

23. Appendices 1 and 1A were listed as the written statements by the Appellant and Mrs A respectively. However, they were not included with the documentation referred to DBS. The Respondent appears to have taken no steps, as part of its decision-making process, to obtain copies of these statements. The Appellant, on the other hand, has made both a Subject Access Request and secured a third party disclosure order from the Upper Tribunal, but her former employers have been unable to produce the document in question. Thus, the Appellant made an application against the care home under rule 16(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for specific disclosure of documents referred to in the investigation report, namely the contemporaneous written statements from the Appellant and Mrs A on the night in question. The application was granted by the Upper Tribunal, and a final answer to that request was provided by the care home on 14 December 2023, namely that Mr B had been unable to locate the documents and a further search for the documents by the care home was also unsuccessful.

24. The care home did however include two other handwritten statements with its referral to the DBS.

25. The first was from Mr K, one of the support workers. It was signed and dated at 02:15 on 4 August 2021 and so was genuinely contemporaneous. It referred to various other aspects of the spot check carried out by the regional manager, but just made a single passing reference to the Appellant: “Thereafter Ms S took myself and Mr O into the court-yard and she opened Mr N’s flat and found the support workers on the sofa”. There was no reference to a chair having been wedged so as to restrict Mr N’s freedom of movement. There was no suggestion that the Appellant or Mrs A were asleep.

26. The second handwritten statement was from Mr O, the shift leader, and was dated 4 August 2021. Again, this referred mostly to other aspects of the spot check. There was a single statement relevant for our purposes: “we proceeded next to Mr N’s flat where she also noted that the light was off in Mr N’s flat and also met one of the staff laying on the sofa with blanket. She also noticed that the door was barricaded with chair in which she expressed her anger and frustration”.

27. The care home also disclosed typed notes of investigation meetings with Mr O and Mr K respectively as held on 8 August 2021 (presumably when interviewed

by Mr B). The relevant part of the note of the meeting with Mr O read as follows (the text has been italicised by us to reflect what we understand as our best guess to have been the investigator speaking):

> *OK so then what happened?*
>
> Ms S asked me to complete a walk round with her, we went into the courtyard and into the first Apartment. When we enter the apartment there was on member of staff on the sofa. I do not think that she was asleep.
>
> The other member of staff was on the chair with a coat over her face, there was a chair wedged under the door handle. *Who was the carer* it was DAK.
>
> *So, you were shift leading?*
>
> Yes
>
> *How frequently were you checking on the staff?*
>
> Every 30 minutes
>
> *Did you notice anything strange on your checking?*
>
> No, I had checked 30 minutes earlier and there were no problems.

28. The typed notes of the meeting with Mr K include nothing directly relevant by way of evidence about what the Appellant was doing or was not doing, beyond the general observation that "I knew that Ms S was not happy about finding people asleep on shift and rightly so".

29. The Appellant was suspended on 4 August 2021, i.e. on the day of the incident, the reason being given in the letter of suspension that she had failed in her duty of care towards the service user and "it is alleged that you have been restricting the movements of a service user … You put a chair outside Mr N's flat, holding the door handle and blocking the door, not allowing the service user to leave his flat. This is a form of abuse". The Appellant resigned by e-mail on 6 August 2021, although shortly afterwards on 9 August 2021 she wrote seeking to withdraw her resignation and stating that she was available to take part in the disciplinary investigation.

30. There is no other relevant contemporaneous documentation. In particular, we note that there is no statement from Ms S, the regional manager. The most that

we have is some hearsay account mediated through the investigation report and notes of meetings conducted by Mr B.

The oral evidence in this case

Introduction

31. As noted above, we heard extensive oral evidence from both the Appellant and Mr O, who was her shift leader at the material time. We summarise the key points from their oral evidence and our credibility findings in relation to each of them in turn.

The Appellant's oral evidence

32. We heard oral evidence from the Appellant for the whole of the morning session of our hearing (2½ hours with a 10-minute break at 'half-time'). The Appellant started by confirming the contents of both her witness statements in the bundle (dated 17 April and 15 November 2024) and her earlier detailed written representations to the DBS. Here we simply record some of the main points of her oral evidence.

33. The Appellant told us she had extensive experience in care work in her home country (Nigeria), but the job with the care home was her first employment in the UK. She had started work there in September 2019, before the Covid-19 pandemic. She had always worked nights, on a 4-nights a week basis, as it fitted in with her family responsibilities. She had not previously received any oral or written warning from the care home about her work as a carer. She had supported Mr N for a long time, indeed since 2019, including staying with him when he had had to be admitted to hospital. Most of her colleagues did not like working with him as his behaviour could be so challenging. She also explained that the day shift did not have time to clean the accommodation so cleaning always fell to the night shift to do. A deep clean was necessary both because of Covid-19 and the mess that residents could create during the day. The Appellant confirmed the layout of the lounge in the flat as shown on Mrs A's hand-drawn plan in the hearing bundle.

34. On the night in question (4 August 2021) Mr N was not able to shower, and as a result he was extremely distressed and aggressive. The Appellant said that she and her co-worker, Mrs A, spent a long time calming him down. Her shift leader, Mr O, had also spent some time in showing them how the newly issued walkie-

talkies worked. As a result, although her shift had started at 10 p.m., it was quite a while before they were able to start cleaning the flat. That process involved having to move the furniture round in the lounge to the flat. At the time that the inspection took place they had finished mopping the floor and were waiting for the floor to dry properly before moving the furniture back. The Appellant confirmed that she had been sitting on the single sofa to the left of the main door to the flat, while Mrs A was on the other 2-person sofa further into the room. Mr N was in his bedroom (to the right of the lounge) watching Peppa Pig on his I-pad. A single chair (a dining chair with no arms) had been moved so it was close to the entrance of Mr N's room, but it was not wedged against the door, which opened out into the lounge. The Appellant added that she had a scarf wrapped like a towel round her head – if she had left it over her shoulders then the risk was that Mr N would just grab it.

35. Ms S had arrived at the flat followed by Mr K, Mr O and the new manager. The Appellant told us she had no real relationship with Ms S, who she had only met 3 or 4 times, but she thought that Ms S liked to impose her way of doing things on staff. The Appellant stated that Ms S had banged on the flat's main door and asked loudly "Why is the light off?". The Appellant inferred that Ms S was not familiar with the details of Mr N's care plan – one aspect of which was that he did not like having the light on and coming under his bedroom door at night, so as far as possible staff worked in the lounge by the light of the TV screen (but with the sound off). The Appellant told us that she had immediately stood up. She denied that either Mrs A or herself had been asleep. Ms S and the others had not come into the room but had then continued with their inspection of the other flats.

36. Later on during that shift Ms S had asked the Appellant to come to the office to write a statement, in which she said she had written down what had actually happened, although Ms S was telling her what to write. She had explained in her statement that the chair was not wedging the door. She had also written about the cleaning they had been doing. The Appellant repeated the various steps she had taken to try and get disclosure of a copy of her statement, but they had all been to no avail, as we have already described above.

37. Following her suspension, the Appellant confirmed that she had resigned on 6 August 2021. She had been thinking of leaving and looking for another job closer to home in any event. She had tried to rescind her resignation on 9 August 2021 but her employer had told her it was not possible. She had also attended the care

home on 9 August 2021 as she wanted to take part in the investigation but she was again told this was not possible as she was no longer a member of staff.

38. Under cross-examination by Mr Serr, the Appellant repeated that Mr N had been very upset at not being able to shower and so it had taken a long time to calm him down. She and Mrs A had mopped him with a wet flannel to help calm him. As a result, they had not started the deep clean until 11.20 p.m. or later. The kitchen had been particularly messy – Mrs A had cleaned the kitchen while the Appellant had cleaned the lounge. When the management team had arrived, Mrs A had been filling in their web-based log of what they had been doing and the Appellant had been listening to the information which Mrs A had described as she had been entering. She repeated that Ms S had stood by the door and shouted. The Appellant thought Ms S was angry because of what she had already seen in the office. The Appellant added that if the door had truly been barricaded then Ms S would have taken a photograph. However, she did not and none of them came into the flat.

39. In our estimation the Appellant has given an honest and consistent account of events. She was plainly genuinely committed to working in the care sector. She communicated her enthusiasm for what was, for her, as much a vocation as a job. In a lengthy and testing session she gave her evidence without hesitation in a clear and compelling fashion. If she thought that a question had misunderstood something she had previously said, she was careful to provide further clarification. She was certainly familiar with and knowledgeable about the details of Mr N's care plan. We do not consider that her credibility was undermined by her decision to resign (being, or so it was argued by the DBS, an indication that she had 'jumped before she was pushed'), not least as very shortly afterwards she sought to rescind that decision and tried to take part in the care home's investigation, but was rebuffed. We also consider that her credibility has been enhanced by the repeated (albeit, through no fault of hers, unsuccessful) efforts she has made to secure a copy of her written statement which the care home appears to have mislaid. Those steps represent an extremely high-risk strategy if she is telling untruths. All in all, we find her to be a credible and reliable witness.

<u>Mr O's oral evidence</u>

40. We heard oral evidence from Mr O for a little over an hour and 20 minutes, in which he confirmed the contents of his witness statement dated 18 April 2024 (which had obviously not been before the original DBS decision-maker). Mr O explained that he was now a registered nurse, having qualified in 2022, and no

longer worked for the care home, having moved into the NHS hospital sector. At the time in question, i.e. in August 2021, he was the shift leader on nights at the care home. As such he was in charge of staff and his functions included allocating staff to support particular residents. He told us he had worked with the Appellant for 2 years and that she was hard-working and one of the most reliable staff he had: "she goes out of her way to meet the needs of patients". He said that she and Mrs A "give their best". He had had no issues with the level of care the Appellant provided. Indeed, if at all possible, he always tried to allocate the Appellant to support Mr N during her wake-at-night shift as she was particularly skilled at calming Mr N down at times when he had become agitated and challenging in his behaviour. This was a regular issue as Mr N frequently became upset, e.g. if he was unable to shower due to the condition of his tumour and sores.

41. Mr O confirmed that he undertook routine checks every half hour or sometimes hourly. On the night in question, Ms S the regional manager had carried out a spot check inspection. He was with Mr K in the office, with the lights off, which had upset Ms S. They had then conducted a tour of the premises. Ms S led the way in front as she wished to see what the staff were doing. When they approached Mr N's flat, Ms S opened the door and saw the chairs had been moved round in the lounge and the lights were off. She had thought Mr N would find it difficult to move out of his bedroom. Mr O said he was behind her at the door, but they did not stay long or go into the room. He added that he had not seen the notes of his meeting with the investigator Mr B on 8 August 2021 at the time in question. The first time he had seen the notes was at the adjourned Upper Tribunal hearing in April 2024. He had never been asked to check or sign those minutes as a full and accurate record of the meeting. The interview he had with Mr B had been about everything that had taken place that might. He had said the chair was in front of the door, not that it was barricaded or wedged. He had not said that the Appellant was sleeping and he did not think that she had been asleep. He had checked on her and Mrs A about half an hour before the inspection and there had been nothing untoward.

42. Under cross-examination by Mr Serr, Mr O reiterated that he had put his best qualified staff to work with Mr N. He added that a lot of staff refused to work with Mr N as he could be so difficult (he referred to one incident when Mr N had assaulted the Appellant). He said that on 4 August 2021 Ms S had been "very mad" and had "given me a dressing down … as a shift leader it was a bad day for me". He conceded that he could be wrong but as far as he knew the Appellant

had not been asleep. He denied having said that the chair was wedged – rather the furniture had been rearranged as the support staff had been cleaning the room, which could get very dirty and be in need of a deep clean. He had been concerned about the care home's treatment of the Appellant and had been disappointed when she had left – he told us that "one of the reasons I came today is because she gives her best … she's one of the best staff I've worked with".

43. Mr O was a quietly impressive witness. He gave his evidence in a clear, thoughtful and matter of fact manner. He did not seek to embellish his evidence. If he was not sure of something he said as much. Whilst he plainly had misgivings about the care home's treatment of the Appellant, and about the support more generally provided for staff, he did not strike us as harbouring any sort of real grudge or animus against his former employer. Indeed, as he has moved on in his professional career he could easily have 'walked away' and taken the view that these proceedings were not a matter that need concern him. The fact that he had gone out of his way and taken the trouble to attend both the original adjourned Upper Tribunal hearing (and had not in the event been called to give evidence) and the more recent effective hearing (when he had just completed a night shift) spoke volumes as to the value he attached to the care and support provided by the Appellant to service users. In all the circumstances, we had no hesitation in accepting his evidence as credible and so reliable.

The Upper Tribunal's findings of fact

44. The DBS's core or primary finding of fact was that the Appellant had "neglected the care and wellbeing of vulnerable adult Mr N by knowingly restricting his movement by way of blocking his bedroom door to prevent access to the lounge, enabling you to intentionally sleep on duty". The DBS sought to buttress this primary finding by two secondary findings. The first was that the chair had been positioned by being wedged under the door handle to prevent the bedroom door being opened. The second was that the Appellant had been found during the inspection to be sat on a chair with an item of clothing over her head and asleep (or with the intention of trying to sleep). The DBS case, in short, was that the Appellant had essentially been caught 'red-handed' by an unannounced inspection and that the Appellant's protestations to the contrary were both improbable and unpersuasive.

45. However, unlike the decision maker at the DBS, we had the opportunity to hear the Appellant's extensive live evidence, as well as the evidence of Mr O, tested under cross-examination and to weigh it against the somewhat sparse

documentary evidence. Our conclusion, in summary, is that the DBS's barring decision placed heavy and undue reliance on untested hearsay evidence, and in large part on untested second or even third hand hearsay evidence.

46. We consider it helpful to review the relevant documentary evidence in date order. The handwritten statement by Mr K on the night in question provides no support for the allegations found proven by the DBS. It simply states that the support workers were on the sofa(s). There was no suggestion that the chair had been wedged so as to restrict Mr N's freedom of movement or that either the Appellant or indeed Mrs A was asleep. Had Mr K himself observed either matter, we might have expected some mention of it.

47. The second handwritten statement on the night in question was from Mr O. At the time he recorded that "she also noted that the light was off in Mr N's flat and also met one of the staff laying on the sofa with blanket. She also noticed that the door was barricaded with chair in which she expressed her anger and frustration". We consider he was reporting what Ms S had said to him rather than giving direct evidence of what he had seen.

48. The typed notes of the investigation meetings with Mr K and Mr O do not take us appreciably further forward. Mr K's responses do not bear directly on the points at issue, beyond recognising that management were not happy about finding staff asleep on duty. The record of Mr O's meeting includes the following passage, which for convenience we have broken down into its numbered constituent parts: "(1) The other member of staff was on the chair with a coat over her face, there was a chair wedged under the door handle. (2) *Who was the carer* (3) it was DAK". It is fairly plain that question (2) was posed by the interviewer, Mr B, while reply (3) was presumably Mr O's response. However, it is entirely unclear whether statement (1) was a statement attributed to Mr O or rather part of question (2). This uncertainty is compounded by the fact that, contrary to good practice, Mr O was not asked to check and confirm the notes of the meeting at the time. We are not satisfied on the balance of probabilities that Mr O stated that "there was a chair wedged under the door handle". Even if he did say that, we think it more likely he was repeating what he had been told by Ms S, rather than giving direct evidence of what he himself had seen.

49. That leaves the investigation report. We have to say that this report, by way of comparison with other reports we have seen in similar cases, was a deeply unimpressive document. Perhaps the most polite assessment would be to say it was a 'rush job' that had not been properly proof-read. There was no specific

evidence as to what the operations manager had said on the Teams call. There was no record of any interview with the two members of staff who were the principal subjects of the investigation. The report alleges that the accompanying statements by the Appellant and her co-worker "openly admit" wrongdoing, yet these important and allegedly incriminating documents were not included with the referral to the DBS and cannot now be located by the care home. This shoddy procedural record-keeping brings seriously into question the quality of the substantive investigation itself.

50. We must weight on the other side of the scales the evidence of the Appellant and Mr O. We have already explained why we found them both to be credible witnesses in their own way. The Appellant has given a consistent account throughout these lengthy proceedings. It has also been a detailed account (as for example in her representations following the minded to bar letter). She was evidently and genuinely committed to caring for Mr N and as such we consider it highly unlikely she would take any steps which might involve placing restrictions on his freedom of movement. We reiterate that we consider her credibility has been enhanced by her determination to try and obtain a copy of her written statement and has not been undermined by her resignation.

51. Mr O's evidence was also clear. He did not accept that the bedroom door had been wedged or barricaded by the chair. On the contrary, he stated that the door could have been opened even with the chair positioned as it was following the deep clean. He did not believe that either of the carers had been asleep. We consider that his contemporaneous statements – insofar as they were in any way inconsistent with his evidence now – reflected what he had been told by Ms S, rather than what he had seen himself. Indeed, we think it likely that Ms S jumped to the conclusion that staff were asleep when she found the lights were off, when in fact there was a perfectly plausible explanation for the reliance on the partial light from the TV.

52. We have not overlooked the fact that in a determination promulgated on 1 November 2024 Mrs A was refused permission to appeal against her barring decision by Upper Tribunal Judge Wright following an oral hearing. However, that determination is not binding on us, not least as it was based on different evidence and different submissions. We note, in particular, that Judge Wright heard submissions from counsel but no oral evidence from Mrs A (nor, of course, did he hear from the Appellant in the present case or from Mr O). The fate of Mrs A's listing is not a matter that falls for consideration by us. However, there must at

least be an argument that the Respondent should consider whether to review that barring decision under paragraph 18A of Schedule 3 to the SVGA. There may also be a wider issue about how the Respondent case manages referrals and appeals where more than one individual is involved in what is essentially the same incident.

53. Be all that as it may, it follows in this case that on the balance of probabilities we find that (1) the chair was not wedged under the bedroom door handle or barricaded so as to restrict access to the lounge and (2) the Appellant was not asleep (or trying to go to sleep) at the time of the spot-check inspection. We therefore conclude that the Barring Decision was based on at least two material mistakes of fact and so was fundamentally flawed.

54. Because we have found that the DBS was mistaken in its findings as described above, we find that the Appellant did not engage in any relevant conduct for the purposes of the SVGA. As such, there was no basis for the Appellant's name being included in any barred list.

55. In the circumstances we need not consider the Appellant's further grounds of appeal that seek to show that the DBS erred in law in reaching its decision to bar the Appellant.

Conclusion

56. The Appellant's appeal is allowed. The DBS made material mistakes in the findings of fact on which its decision was based. Pursuant to section 4(6)(a) of the SVGA, the Upper Tribunal directs the DBS to remove the Appellant's name from the adults' barred list.

Nicholas Wikeley
Judge of the Upper Tribunal

Christopher Akinleye
Specialist Member of the Upper Tribunal

Roger Graham
Specialist Member of the Upper Tribunal

Authorised by the Judge for issue on 11 February 2025