



Neutral Citation Number: [2025] UKUT 98 (AAC)  
Appeal No. UA-2024-001121-V

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**RW**

**Appellant**

**- v -**

**DISCLOSURE AND BARRING SERVICE**

**Respondent**

**Pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:**

**No one shall publish or reveal:**

**the name or address of any of:**

- a. the Appellant in these proceedings, who is referred to by the cipher RW**
- b. the resident/service user who is said to have been mistreated by RW, who is referred to by the cipher AG**
- c. any other resident/service user or member of staff at the care home where AG resided and RW worked**

**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 sanction 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.**

**Before:** Upper Tribunal Judge Church and Tribunal Members Hutchinson and Smith  
**Hearing date(s):** 11 March 2025  
**Mode of hearing:** Remote oral hearing by CVP

**Representation:**

**Appellant:** Mr Steven Gooden of Standley & Co., solicitors

**Respondent:** Mr Ben Fullbrook of counsel, instructed by DAC Beachcroft LLP

*On appeal from:* The Disclosure and Barring Service

Case No: 01006575770

Decision Date: 5 April 2024

**SUMMARY OF DECISION**

**SAFEGUARDING VULNERABLE GROUPS (65)]** (65.1 *Children's Barred List*; 65.2 *Adults' Barred List*)

The issue in this appeal was whether the DBS's decision to place the Appellant's name on both the Adults' Barred List and the Children's Barred List was based on a mistake or mistakes of fact.

The Upper Tribunal decided that it was.

The decision is mainly about how to assess the probative value of evidence.

*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 judge follow.*

**DECISION**

**The decision of the Upper Tribunal is to allow the appeal. The Disclosure and Barring Service's decision of 5 April 2024 was based on material mistakes of fact.**

**The Upper Tribunal directs that the Appellant's name is removed from both the Adults' Barred list and the Children's Barred List.**

### MESSAGE TO RW FROM THE UPPER TRIBUNAL

Thank you for coming to the Upper Tribunal to answer our questions. We could see that it was difficult for you.

We listened carefully to what you said happened.

We believed you. We don't think you harmed AG or were mean to him.

We have decided the DBS was wrong to put your name on the Barred Lists.

We have told them to take your name off both Barred Lists.

Then you will be allowed to work with vulnerable adults and children again if you want to.

## REASONS FOR DECISION

### Introduction

1. This appeal is about whether the Disclosure and Barring Service (the “**DBS**”) was mistaken when it found that RW acted in an abusive way towards AG, a vulnerable adult in her care.
2. We had evidence that the DBS didn't have when it made its decision to place RW's name on the barred lists. That evidence included hearing RW give her account of what happened at the hearing before the Upper Tribunal, where the tribunal and the barrister for the DBS had the opportunity to ask her questions to test whether she was telling the truth, and whether her account was reliable.
3. We believed RW and we decided that the DBS was wrong to find that she had done what she was accused of. We have told the DBS to take RW's name off the barred lists.

### Factual background

4. RW was, at the time relevant to the allegations at the centre of this appeal, employed as a support worker in a residential care home for vulnerable adults (the “**Care Home**”). She was referred to the DBS in relation to an incident which occurred while she was at work at the Care Home, and for which she was dismissed by her employer.
5. RW accepts that while on duty on 25 February 2023, resident AG was persistently seeking her attention, including help with changing the batteries on his remote, and she told him she was busy, and he needed to wait until she had finished what she was doing. She also accepts that when she went to AG's bedroom to put

away laundry, AG blocked the doorway and she put her hands on his waist and moved him forwards so that she could pass, which she thought was "normal process".

6. However, RW's colleague SB, who was working the shift with RW, gave a very different account of events. SB's account prompted an investigation by their employer, a referral to the DBS and RW's dismissal from her job.
7. Following a paper review, the DBS preferred the colleague's account over RW's and found it proved on the balance of probabilities that RW:
  - a. shouted at resident AG ("**Allegation 1**");
  - b. threatened to knock AG out, pointing a finger in his face ("**Allegation 2**");
  - c. told AG to shut up, to go to his room and to stay there ("**Allegation 3**"); and
  - d. pushed AG with both hands in his back down the hallway, causing him to stumble ("**Allegation 4**" and, together with Allegations 1, 2 and 3, the "**Allegations**").
8. On 5 April 2024, having found the Allegations proved on the balance of probabilities, the DBS decided that RW had engaged in "relevant conduct" in relation to vulnerable adults, and that such conduct was transferable to children. It decided that it was appropriate and proportionate to place RW's name on both the Adults' Barred List and the Children's Barred List (the "**Barring Decision**").

## Legal framework

### The statutory scheme

9. There are multiple gateways under Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (the "**2006 Act**") to a person's name being included on a barred list.

### *The 'relevant conduct' gateway*

10. In this case the DBS relied upon the "relevant conduct" gateway. That required the DBS to be 'satisfied' of three things:
  - a. that RW was at the relevant time, had in the past been, or might in future be 'engaged' in, 'regulated activity' in relation to children and/or vulnerable adults (see paragraphs 3(3)(aa) (in relation to children) and 9(3)(aa)(in relation to vulnerable adults) of Schedule 3 to the 2006 Act);
  - b. that RW had 'engaged' in (see paragraphs 3(3)(a) (in relation to children) and 9(3)(a) (in relation to vulnerable adults) of Schedule 3 to the 2006 Act) 'relevant conduct' (defined in paragraph 4 (in relation to children) and paragraph 10 (in relation to vulnerable adults); and
  - c. that it was 'appropriate' (and proportionate) to include RW on the barred list(s) (see paragraph 3(3)(b) (in relation to children) and 9(3)(b) (in relation to vulnerable adults) of Schedule 3 to the 2006 Act).
11. If the DBS was satisfied of all three matters above, it was required to place RW's name on both barred lists.

12. RW does not dispute that the 'regulated activity' requirement is met in this case by reason of her work as a support worker to vulnerable adults at the Care Home, so item a. in paragraph [8] above is not in issue.
13. Whether RW engaged in 'relevant conduct' in relation to vulnerable adults is the key issue in this appeal.
14. Although RW says it was neither appropriate nor proportionate to place her name on any barred list, she does not dispute that the conduct that the DBS found her to have engaged in would make barring appropriate and proportionate. However, her case is that she didn't engage in 'relevant conduct' because each of the Allegations was false, and because of this there was no basis for her name being placed on any barred list.
15. Those unfamiliar with this jurisdiction may wonder why the DBS argues that RW engaged in 'relevant conduct' in relation to children, given that the allegations relate to her conduct in relation to an adult in his 50s. The reason for this is the way that 'relevant conduct' in relation to children is defined in paragraph 4 of Schedule 3 to the 2006 Act. That definition includes "conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him" (see paragraph 4(1)(b) of Schedule 3 to the 2006 Act, emphasis added). There doesn't need to be any conduct that has actually involved children.

#### *The Upper Tribunal's jurisdiction under the 2006 Act*

16. Section 4 of the 2006 Act sets out the circumstances in which an individual may appeal against the inclusion of their name in the barred lists or either of them. An appeal may be made only on grounds that the DBS has made a mistake on any point of law or in any finding of fact which it has made and on which the barring decision was made (see section 4(1) and (2) of the 2006 Act).
17. An appeal under section 4 of the 2006 Act may only be made with the permission of the Upper Tribunal (see section 4(4) of the 2006 Act).
18. Unless the Upper Tribunal finds that the DBS has made a mistake of law or fact it must confirm the decision of the DBS (see section 4(5) of the 2006 Act). If the Upper Tribunal finds that the DBS has made such a mistake it must either direct the DBS to remove the person from the list or remit the matter to DBS for a new decision.
19. If the Upper Tribunal remits a matter to DBS under section 4(6)(b) the Upper Tribunal may set out any findings of fact which it has made (and on which the DBS must base its new decision) and the person must be removed from the list until the DBS makes its new decision, unless the Upper Tribunal directs otherwise.
20. Section 4(3) of the 2006 Act provides that, for the purposes of section 4(2) of the 2006 Act, whether or not it is 'appropriate' for an individual to be included in a barred list is "not a question of law or fact".

#### The relevant authorities

21. An appeal under section 4 of the 2006 Act is not a full merits appeal permitting the Tribunal to substitute its own judgment on the question of appropriateness.

An appeal can succeed only if the appellant can demonstrate an error in a material finding of fact or in the approach taken by the DBS as a matter of law.

22. 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) of the 2006 Act and relevant case law. In particular, the judgment as to appropriateness (described by Wyn Williams J in *R (RCN) v SSHD & ISA* [2010] EWHC 2761 (Admin) as “the ultimate question”) may only be challenged on the grounds that it is irrational, disproportionate or otherwise unlawful (see §104 and see also *DBS v AB* [2021] EWCA Civ 1575 (“**AB**”). The DBS is well-equipped to make safeguarding decisions of this kind (*AB* at §§43-44, 55, 66-75)).
23. When it comes to mistakes of fact, the ‘starting point’ for the Tribunal’s consideration will be the DBS decision: *PF v DBS* [2020] UKUT 256 (“**PF**”), §51(g). Notwithstanding that, the Tribunal will not defer to the DBS on factual matters, but the amount of weight given to the DBS’s findings of fact will depend on all the circumstances: *PF* at §§49 and 51(f). The evaluation of evidence is not a mistake of fact and therefore if an appellant does not produce evidence on appeal which was not available to the DBS, then the Tribunal may only find that there has been a mistake of fact if it concludes that there is no evidence to support that finding of fact or that it was irrational: *DBS v JHB* [2023] EWCA Civ 982 (“**JHB**”) at §§93-95.
24. If the Tribunal hears evidence which was not before the DBS, it may be entitled to reach the view that, having heard that evidence, a factual finding of the DBS was wrong: *JHB*, §95; *DBS v RI* [2024] EWHC Civ 95 (“**RI**”), §§28-29. Any mistake of fact must be material in the sense of making a material contribution to the overall decision: *PF*, §51(b).
25. Where it is submitted that a decision to include a person on the ABL or CBL amounts to a disproportionate interference with that person’s rights under the European Convention on Human Rights (“**ECHR**”), the Tribunal must accord ‘appropriate’ weight to the conclusions reached by the DBS on this matter, noting its particular expertise in these matters: *B v ISA* [2013] 1 WLR 308. If the Tribunal finds that the DBS has exercised its power rationally and in accordance with the purpose of the 2006 Act, “it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights”: *Belfast City Council v Miss Behavin’ Ltd* [2007] 1 WLR 1420.
26. The appeal is against the decision made by the DBS, not simply the contents of the decision letter: see *XY v ISA* [2011] UKUT 289 (AAC) (“**XY v ISA**”) at §40. The DBS’s decision must “be read fairly and as a whole”: *AB*, §46.
27. At §55 of *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”.

28. 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 *AB* meant that the Upper Tribunal could consider, on appeal under the 2006 Act, 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).
29. 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* at §40).
30. 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).
31. 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 2006 Act which provides a basis for departing from that general principle (*CD v DBS* [2020] UKUT 219 (AAC)).
32. DBS is not a court of law. Reasons need only be sufficient/adequate. The DBS does not need to engage with every potential issue raised. There are limits, too, as to how far the 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.
33. 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) of the 2006 Act 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.

### **The Barring Decision**

34. The Barring Decision was communicated to RW by a letter dated 5 April 2024 headed ‘Final Decision Letter’. We do not reproduce the letter in its entirety because the only matter in issue in this appeal is whether the Barring Decision was based on a material mistake of fact. The passages relating to the DBS’s evaluation of the evidence and its fact finding are as follows:

“We have considered all the information we hold and are satisfied of the following:

- Shouted at, threatened to knock out service user AG, pointed a finger in his face, told AG to shut up, to get to his room and stay there.
- On 25/02/2023 you – pushed AG with both hands in his back down the hallway, causing AG to stumble.”

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.

It is also considered that you have engaged in relevant conduct in relation to children, specifically conduct which, if repeated in relation to a child, would endanger that child or would be likely to endanger him or her.

We are satisfied that a barring decision is appropriate. This is because you shouted at service user AG, you threatened to knock him out, pointed your finger in his face, told AG to shut up, to get to his room and stay there. It has also been found proven that you acted irresponsibly by pushing AG with both hands in the back, down the hallway, causing AG to stumble, not only resulting in the apparent .. emotional harm of AG, a service user in your care but also had the potential to cause physical harm to AG if he were to have fallen.

Throughout your written statement and the Disciplinary Hearing you attempted to provide an explanation for your actions and apportion blame onto AG and your belief that he was 'misbehaving' indicating a lack of understanding and regard for his behaviour and an attitude that AG's actions were born [sic] out of disobedience rather than as a result of his learning disabilities and rather than respond in a tolerant manner, you have demonstrated a lack of respect for AG, becoming impatient and domineering, ordering AG to his room. The DBS are satisfied that you have also prioritised your need to complete household tasks over the needs and welfare of AG. IT is considered that your actions demonstrate a level of callousness and lack of empathy or those in your care.

You also have attempted to detract from your behaviour by making counter allegations against SB, another staff member on duty and the witness to your conduct but with no evidence to substantiate your accusations, this has not been considered further."

### The Evidence

35. It is apparent from the Barring Decision Summary document (at pages 90-102 of the Upper Tribunal bundle) that the DBS's findings of fact were based on its assessment of the evidence of three witnesses:
- a. SB (the colleague with whom RW was working at the Care Home on the date relevant to the Allegations);
  - b. AG (the vulnerable adult resident at the Care Home at the centre of the Allegations); and
  - c. RW.

### SB's evidence

36. SB's evidence comprises a single handwritten document (at pages 46-47 of the Upper Tribunal bundle) headed "Sat 25<sup>th</sup> February 2023" (the date relevant to the Allegations). It is written in the first person, and so appears to have been produced by SB herself. While SB's name appears at the bottom of the document there is no statement of truth and no signature. We refer to the document as "**SB's Account**".
37. SB's Account (which we reproduce in full and as written) reads as follows:
- "The morning shift was absolutely lovely with Anna and myself.
- No problems everyone was happy.



[RW] came in on her afternoon shift to work with me as I was doing a allday shift [sic].

About 10 to 20 minutes after arriving on her shift everything turned into a complete headache.

She started raising her voice at [AG], shouting and threatening to knock him out. She was pointing her finger in his face, telling him to shut up and to get in his room and to stay there.

She pushed him full on with both hands on his back down his hall way, causing [AG] to stumble, but managed to stay balanced on his feet.

I had to ring [ML] to come out to sort it.

I was horrified [sic] to see such disgusting behaviour from a member of staff.

I went home feeling physically sick with a banging headache.

[SB]

Sorry [ML], I just think it will be extremely hard for me to work with this lady again."

38. SB was not interviewed as part of the disciplinary investigation, and was not called as a witness at the hearing before the Upper Tribunal.

#### AG's evidence

39. The DBS had before it two documents which relate to two interactions that ML (the manager of the home) had with AG.

40. The first document (at page 48 of the Upper Tribunal bundle) is a handwritten note dated 3 March 2023, six days after the date relevant to the Allegations. It reads as follows:

"Re [AG]

[M]: [A], did RW push you in the back with her hands and say get into your bedroom?

[A]: Stated and showed actions what RW did by pushing his two hands forward then said I'm alright now.

[A] clearly did not want to say anything about staff. Has it clearly upset him."

The document is signed by [JH].

41. The second document (which can be found at page 54 of the Upper Tribunal bundle) reads as follows:

"Statement received 20<sup>th</sup> March 2023

Re: [KS] 10<sup>th</sup> March 2023

[M] was contacted by [KS] on the 10<sup>th</sup> March regarding the incident that had taken place with AG and staff member RW.

[K] asked the Home Manager to ask (A) some Questions regarding the incident.

- How is (A) After the incident.
- Replied he was fine.
- Did (RW) push you with her two hands.
- Replied Yes pushed me in the back and told me to get into my room. I'm fine.
- Would (A) Like the Social Worker [K] to speak to his Sister.

- Replied NO he would like either [J] or [M] to talk to his Sister Liz.
- [JH] (Deputy) Contacted (A) sister on 8<sup>th</sup> of March and informed he [sic] of the incident which took place on the 25<sup>th</sup> of Feb.

[K] also asked for the question to be asked.

What do you want to happen to the member of staff concerned?

Replied not to look after him again.

[K] Social Care Facilitator also spoke to [A] personally to see if he was all right. And asked him a few questions.”

42. AG was not called as a witness at the hearing before the Upper Tribunal.

### RW's evidence

#### *RW's written account*

43. RW's handwritten account of events (found at pages 50-51 of the Upper Tribunal bundle) reads as follows<sup>1</sup>:

“My account of events of 25<sup>th</sup> February 2023

My shift started at 4pm. As I went in to get handover resident 'AG' kept calling me. I had told him I was busy and that he needs to wait, but he continued calling me.

I then asked what was wrong? He replied “nothing”. After handover I carried on with my normal duties. During this time three of the residents were generally playing it up. Two of them was going up the stairs on their own, and AG was constantly following me around the home saying “I need you”, “my remote isn't working”, “you're not listening to me”, “I have had enough”.

I kept telling him I am busy you just need to wait a bit. I did change the batteries for his remote. Several times during the shift.

At dinner time [SB] sat them down to speak to them about why they was playing up.

I said “Why you playing it up since I have been in?”

During this time [SB] shouted at the residents “Why the fuck are you all not fucking listening to me and RW you all need to start fucking listening”.

I then said to [SB] “You can't be swearing at them. Just let manager know what's going on.”

She replied I am going to walked out in a minute as none of you are still listening.

Later on after this event I trying to get into AG bedroom to put washing away, but AG was stood in doorway of his bedroom.

I asked him nicely to move out of the way so I can get through but still wouldn't move out o the way. So I asked him again. In fact several times. But he wouldn't move to let me pass. I put my hands on his waist and move him forwards so I could pass. In the same way that is normal process.

Later on [M] (Manager) came in to pick [SB] up to take her home but before leaving [ML] spoke with AG.

---

<sup>1</sup> Please note that we have corrected some grammatical and spelling errors for ease of understanding.

After this [ML] and [SB] left. Everything was fine and I carried on with my normal duties including putting [JS] and DC to bed as usual and also AG put himself to bed as usual and also AH put himself to bed. During the night I did my duty of going into all residents to make sure they are OK.

The next morning I did the normal handover to the next member of staff.”

#### *RW's disciplinary interview*

44. The handwritten notes taken by [JS] at RW's disciplinary hearing held on 21 March 2023 can be found at pages 55-64 of the Upper Tribunal bundle. What RW is recorded as having said is largely consistent with what she said in her written account. She refers to AG “playing it up”, constantly calling her and asking for help with the batteries for his remote. She says that she asked him “to please go in his bedroom” but denied speaking to or shouting at him as alleged, and she denied threatening to knock him out or pointing a finger in his face.
45. RW referred to AG constantly asking for things as “misbehaving”. She admitted to raising her voice with AG, but explained that she had to do this because AG is deaf. She denied shouting at AG and denied telling him to “shut up and get in his room”. She said that she “asked him to go back in his room”, and maintained that she did this “nicely”.
46. It was put to RW in the interview that she pushed AG into his room, which she denied. She said, rather, that she “moved him by placing hands on hips and moving him over. I didn't push him”. She said “I went into his room, moving him across so I could get past and put the laundry in his room.” When asked “why did you/would you touch him in the first place? Why?” She replied “I don't know, obviously it was wrong now”. When asked what she should have done she responded “asked him instead of moving him across”.
47. When asked “Are you accepting you shouldn't have moved him”, she responded “I shouldn't have pushed no moved him and waited for him”.
48. It is clear from the note of the disciplinary meeting that RW was pressed quite hard by those interviewing her, with questions sometimes being asked repeatedly in quite an insistent way. It was put to RW that AG had made clear allegations against her 7 days apart, with “no deviation or changes” from his first statement, and she was asked whether she was saying that AG was lying.

#### **DBS's evaluation of the evidence**

49. In its Barring Decision Summary document under the heading “Evidence Evaluation”, the DBS explained how it assessed the evidence to arrive at its findings of fact. It said:

“This allegation was made by SB (Flag 2) and corroborated in part by the service user AG (Flag 3, 7)

[RW] admitted that she had to raise her voice to AG as he was deaf and asking him to go to his room but denied pushing him, pointing her finger in his face and threatening to knock him out (Flag 5, 8)

[RW] is inconsistent in her written statement and her responses in her disciplinary in her statement she states she was trying to put AG's laundry in his room and he was in the doorway she states she asked him nicely to move out of the way several times and when he didn't she moved him by putting her hands on his waist/hips. In her disciplinary she does not indicate that she had asked

AG to move she just moved him to one side (Flag 5, 8, 9). This inconsistency lowers the credibility of her statement.

It must also be noted that in her Disciplinary [RW] lets slip that she “shouldn’t have pushed” AG and appears to quickly change what she is saying to “no moved him” (Flag 8).

[RW]’s employer asked her what she did with the laundry she would have been carrying when she moved the Service User. [RW] said she put it on the floor. The employer stated that the space either side of the room at the bottom of the corridor is quite narrow and putting washing on the floor and moving the Service User without having to step on or over the washing may have been difficult (Flag 8).

[RW]’s version of events would also indicate that she had placed priority of [sic] getting the household tasks done rather than interacting with AG. She talks about him misbehaving when he is requesting her attention and admits that at one point she did ask him to go to his room (Flag 8).

[RW] makes counter allegations against SB but provides no explanation as to why she did not report her concerns at the time or provides any evidence to substantiate her allegations. Furthermore she provides no explanation as to why SB would make malicious allegations against her and that in part are corroborated by AG (Flag 5, 8)

Given that [RW]’s statements lose credibility due to their inconsistencies, that there is no reason to doubt the credibility of SB’s or AG’s statements this allegation can be found proven on the balance of probabilities.”

### **Summary of DBS’s case before the Upper Tribunal**

50. In his oral submissions Mr Fullbrook said that RW’s accounts of what happened had changed in some respects over time. While he acknowledged that the questions AG had been asked were leading, he said there were elements of the record of the interactions with AG that should be given weight, including his indication that he didn’t want RW to look after him anymore.
51. Mr Fullbrook argued that SB’s evidence was clear, and was not “a complete fabrication”, because RW herself accepted that there was some kind of incident in the corridor outside AG’s room: although the “details” of their accounts differ, it is accepted by RW that AG’s behaviour was getting on her nerves, voices were raised, and AG was physically moved. In his skeleton (which he adopted at the hearing) he argued that while RW denied “the specific and most damaging details”, these concessions “provide some support” for Allegations 1, 3 and 4, and they bolster SB’s credibility “in that it is clear that she did not invent the whole thing.”
52. In his oral submissions Mr Fullbrook said that “SB clearly knew that something happened” and there was no reason why she would fabricate her account. While RW voiced concern that SB may have made a complaint about her before, there was no evidence to support this speculation on RW’s part, and indeed the reference provided by ML (the Care Home manager) says that no complaints had been made about RW until the Allegations.

### **Summary of RW’s case before the Upper Tribunal**

53. The case run by Mr Gooden, for RW, was very simple. It was that RW was an honest and reliable witness. She had told the truth, and the DBS was wrong to make the findings that it did.

**The Upper Tribunal's assessment of the evidence**

54. We had the benefit of all the evidence that was before the DBS when it made the Barring Decision. This was the paper evidence at pages 21-115 of the Upper Tribunal Bundle.
55. We also had the advantage of additional paper evidence that was not before the DBS, namely RW's UT10 application form (at pages 2-9 of the Upper Tribunal bundle), a letter in support of RW's appeal from her mother, who is employed by the same care provider for whom RW worked until her dismissal (at pages 13-14 of the Upper Tribunal bundle), RW's appeal letter (at page 15 of the Upper Tribunal bundle) and two email references (one dated 3 March 2025 from ML, the manager at the care provider for whom RW worked until her dismissal, and one dated 2 March 2025 from the mother of a child with whom RW was friends at school).
56. Finally, we had the benefit of RW's oral evidence at the hearing.
57. Our task was to consider all the evidence and to decide whether the Barring Decision was based on any mistake of fact.
58. We took the Barring Decision as our 'starting point', in accordance with the approach approved in *PF*.
59. We were not impressed by the DBS's explanation in its Barring Process Summary of its evaluation of the evidence. It appears to have preferred SB's evidence to RW's on four bases:
  - a. it was partially corroborated by AG's evidence;
  - b. RW's evidence had less credibility because there were inconsistencies in it;
  - c. RW failed to explain why she didn't report her concerns about SB at the time or provide evidence to substantiate her allegations; and
  - d. There was no reason to doubt SB's evidence.

***Corroboration provided by AG's evidence***

60. We were dismayed by the wholly improper and unfair way that the employer carried out its investigation into the Allegations. That investigation was not fair, either to RW or to AG.
61. Taking AG's evidence first, the first "interview" with AG amounted to his being asked a single question. That question was an emphatically leading one: "did RW push you in the back with her hands and say get into your bedroom? Any response to such a question, even by someone without a learning disability, would have only slight probative value.
62. There is no transcript of AG's response to the question, but rather a narrative account: "[AG] stated and showed actions what RW did by pushing his two hands forward then said I'm alright now". It is unclear whether AG "stated" what RW did, or whether his only statement was his saying "I'm alright now". If he did say anything else, what he said has not been noted. Given the notetaker's comment that AG "clearly didn't want to say anything about staff", the more likely reading is that AG said nothing about what RW did.

63. So, what should be made of AG's gesture? The DBS decided it was "in part" corroborative of the Allegations. However, given that AG has a learning disability, and given the complex nature of the question, it may be that AG was simply modelling the action that had just been described to him by ML as AG tried to process what he was being asked or told.
64. In any event, we find the record of AG's "interview" with ML to be much more consistent with RW's account of what happened (that she put her hands on his waist and moved him so that she could pass) than with what SB alleged. Certainly, nothing in his recorded response provides any corroboration for the allegations that RW shouted at him, told him to shut up and go to his room and stay there, pointed her finger in his face and threatened to knock him out.
65. The second interaction with AG hardly takes us much further. The only question that touches on the Allegations was another leading question very similar to the one put to AG in the first interaction: "Did (RW) push you with her two hands"? This time a response is recorded: "Replied Yes pushed me in the back and told me to get into my room. I'm fine."
66. This response is capable of corroborating the allegation that RW pushed AG in the back, and told him to go to his room, but it doesn't corroborate the allegation that she pushed him with both hands down the hallway causing him to stumble, let alone any of the other elements of the Allegations.
67. The only conflict between AG's evidence and RW's evidence is that AG says that RW "pushed me in the back" while RW says that she placed her hands on his waist and moved him out of the way. They are agreed that RW asked him to go to his room.
68. AG is recorded as having said that he didn't want "the member of staff concerned" to look after him anymore. However, the "member of staff concerned" is not named, and given that the conversation with AG took place on 10<sup>th</sup> March 2023, a fortnight after the incident, it is not clear whether he was clear as to whom he was being asked about. Further, he is not reported to have said *why* he didn't want "the member of staff concerned" to work with him. While it is possible to infer that it is for a reason connected with the Allegations, given how slight AG's recorded account is, such an inference is not a reliable one.

*Impact of inconsistencies on RW's credibility, and RW's live evidence before the Upper Tribunal*

69. The DBS found that the inconsistencies in RW's evidence lessened RW's credibility, but prior to making the Barring Decision the DBS didn't have the opportunity to hear RW's live evidence or to test her case under cross-examination. That opportunity arose at the hearing before the Upper Tribunal.
70. RW was the only witness called to give evidence at the hearing, so she is the only witness whose evidence has been tested. She clearly found the experience of giving evidence very difficult. She required a break in the proceedings when she became tearful and overwhelmed, but we found her to be forthcoming in her evidence. She was not circumspect in her responses. She did her best to answer the questions put to her, and she was willing to admit to things that didn't necessarily help her case (accepting under cross-examination that AG was

getting on her nerves at the relevant time, that she moved AG physically, and that she shouldn't have done that).

71. We note that the DBS made much of RW referring to AG "misbehaving", suggesting that this indicated that she failed to recognise AG's persistent demands for attention as being associated with his learning disability. We had the benefit of hearing RW's oral evidence. She sometimes struggled to find the right words and used terms that jarred. For instance, she referred to AG as "a Down's Syndrome". However, we did not infer from the words RW used that she had a callous attitude towards AG. Rather, we found that RW was sometimes just a bit clumsy in her choice of words. This was most likely as a result of her own learning disability, which she was able to describe as relating to her cognitive abilities and language/vocabulary. RW was not able to provide objective documentary evidence of her learning disability, but her difficulties were apparent from her presentation at the hearing. We accepted what she told us about having a learning disability and having "been statemented", receiving additional support in the classroom and extra time when undertaking assessments. Her evidence on this was corroborated by the email evidence of Ms Walker, the mother of one of RW's school friends.
72. There were some inconsistencies between what RW said in her written account, what she said in her disciplinary interview, and what she said in her oral evidence before the Tribunal. Mr Fullbrook put these inconsistencies to RW at the hearing.
73. We noticed that RW sometimes struggled to understand the questions put to her, especially when the questions were long or involved multiple parts. Sometimes she seemed not to understand the rephrased questions fully either. However, rather than reveal her difficulty, she tended to get flustered and simply agree with whatever the questioner was putting to her.
74. We decided that this was likely to have explained the inconsistencies in her responses in her disciplinary hearing.
75. We found the inconsistencies in RW's evidence to be relatively minor, and we assessed that they were more likely the result of failings in her memory, difficulties in expressing herself verbally, and/or her becoming flustered and overwhelmed when put under pressure, rather than being indicative of dishonesty on her part. In her disciplinary interview, when challenged about inconsistencies in the details of her account, RW explained: "I didn't make this up, I just say things differently".
76. RW was, however, consistent in her denial that she had threatened to punch AG, pointed her finger in his face, shouted at him, pushed him or told him to "shut up".
77. Considering her evidence in the round, we found RW to be honest and her account to be largely reliable.

*RW's failure to report her concerns about SB*

78. In her evidence before the Upper Tribunal RW explained that she was not prone to complain. In her words at the hearing: "I am not that kind of person who likes to get people into trouble". We had the opportunity to observe RW's demeanour at the hearing. She presented as someone who was compliant and conflict-avoidant. We found this to be consistent with her not having reported SB's

swearing and inappropriate behaviour during their shared shift on 25<sup>th</sup> February 2023 until she was questioned about the Allegations, when it became necessary to do so.

79. We were more troubled by SB's failure to report what she claimed to have witnessed earlier than she did, especially because she claimed in her written account to have called ML after the alleged incidents "to come out to sort it". However, it is apparent that SB did not report the Allegations to ML when she came to visit on 25<sup>th</sup> February 2023. Had ML been made aware of the Allegations at that stage it is unlikely she would have left RW alone in charge of AG and the other residents when she, according to RW's unchallenged evidence, gave SB a lift home in her car.
80. Although SB's Account is dated 25<sup>th</sup> February 2023, it was accepted by Mr Fullbrook on behalf of the DBS that ML wasn't made aware of the Allegations until Monday 27<sup>th</sup> February 2023. It is apparent that as soon as she was made aware, she initiated an investigation into the Allegations and RW was sent home.
81. SB's statement that she was "horrified [sic] to see such disgusting behaviour from a member of staff" and that she "went home feeling physically sick with a banging headache" is inconsistent with her failure to report the Allegations to ML on the day in question. She had the perfect opportunity to do so when ML came to the Care Home to visit in response to SB's telephone call (which SB claimed was made for the purpose of asking ML "to come out to sort it"). Even if she hadn't wanted to report the Allegations in RW's presence, given that ML gave SB a lift home in her car, there was also an opportunity for SB to disclose the Allegations in private.
82. We consider SB's delay in reporting the Allegations far more undermining of her credibility than RW's failure to voice her concerns about SB was of RW's credibility.

*No reason to doubt SB's evidence*

83. Given what we say above about SB's failure to report the Allegations on 25<sup>th</sup> February 2023, we consider there to be very good reason to doubt SB's evidence.
84. Further, we note that SB's Account has very little probative value because, while it reports the Allegations themselves, it does not explain how SB knew that RW did as she alleged. SB doesn't say where she was when the alleged events occurred, or what she could see or hear. She doesn't say whether the words she reports are the actual words said (or shouted) or whether they are a paraphrase. Indeed, she doesn't indicate whether she was a direct witness to the alleged events at all, or whether the events she tells of were reported to her by another.
85. Because SB wasn't interviewed as part of the disciplinary investigation and because she wasn't called as a witness at the hearing before the Upper Tribunal, we can't answer any of these questions. As such her evidence is worthy of very little weight.
86. By contrast, in her oral evidence RW gave a detailed description of the layout of the Care Home and said that SB was in the dining room with the other residents giving them their dinner at the time AG blocked the door, and she wouldn't have been able to see RW or AG from there. We accepted RW's account.



**The Upper Tribunal's assessment of DBS's findings of fact, and the Upper Tribunal's own findings of fact**

87. Having considered all the evidence before us, including evidence that was not before the DBS when it reached the Barring Decision, we are persuaded that, to use Mr Fullbrook's phrase, "something happened" during the shift that RW and SB worked together on 25<sup>th</sup> February 2023.
88. However, establishing that "something happened" is clearly insufficient to justify placing RW's name on the barred lists. We do not accept the argument that, because RW accepts the truth of some facts that are consistent with the Allegations, that acceptance provides support for those elements of the Allegations that she denies. Neither do we accept the argument that RW's acceptance of elements of what SB said bolsters SB's credibility as a witness. Each of those propositions is fallacious.
89. The balance of the evidence does not persuade us that the "something" that happened that day involved any violence, threat of violence, shouting, or derogatory behaviour on RW's part.
90. We make the findings of fact that follow.

*Allegation 1: "Shouted at resident AG"*

91. We find that RW raised her voice to AG, but she didn't shout at him, and we accept that the reason she raised her voice was simply to make herself heard due to AG's hearing problem, and not because she had lost her temper. The DBS was mistaken in its finding that RW shouted at resident AG.

*Allegation 2: "threatened to knock AG out, pointing a finger in his face"*

92. We find that RW felt frustrated by AG's persistent requests of her, which got on her nerves, and by his blocking the doorway when she wanted to put away laundry. However, there was no credible evidence to support the allegation that RW threatened to knock AG out, pointing a finger in his face and the DBS was mistaken in its finding that she did. The DBS was mistaken in its finding that RW did so.

*Allegation 3: "told AG to shut up, to go to his room and to stay there"*

93. We find that RW asked AG to go into his room, but the DBS's finding that she told AG to "shut up, to go to his room and to stay there" was mistaken.

*Allegation 4: "pushed AG with both hands in his back down the hallway, causing him to stumble"*

94. RW accepts that she placed her hands on AG's hips/waist to move him to the side, or possibly into his room.
95. While Mr Fullbrook suggested that RW's "slip" when she said that she "shouldn't have pushed, no moved him" revealed that she had in fact "pushed" AG. However, in the light of what we witnessed of RW's clumsiness with language and her tendency to get flustered when under stress, we didn't find this "slip" to be sinister. It was merely a clumsy way of describing the manoeuvre that she had described.

96. The word “push” permits of many meanings. The action that RW described could, just about, be termed a “push” in the sense that it involved the application of pressure to a part of AG to move him away from the point of application of pressure.
97. RW should have simply put the laundry basket down and left AG alone. She should not have touched AG at all. Notwithstanding that, and however the manoeuvre that RW performed is labelled, we are not persuaded that it involved the application of any significant or sudden force, and we are not persuaded that the action was in any way violent or aggressive.
98. Although we find that what RW did was contrary to her training and to good practice, we do not find that it amounts to “relevant conduct” for the purposes of the 2006 Act.
99. As such, we find that the DBS’s finding that RW “pushed AG with both hands in his back down the hallway, causing him to stumble” was mistaken.

### **Conclusion**

100. Having considered evidence that was not before the DBS, which we found to be compelling and to place a different complexion on the evidence that was before the DBS, we have found that the Barring Decision was based on material mistakes of fact and we have made our own findings based on all the evidence before us (as *RI* permits us to do).
101. Where the Upper Tribunal finds that the DBS has made such a mistake or mistakes it must either direct the DBS to remove the person from the list or remit the matter to DBS for a new decision.
102. *AB* says the usual order will be remission back to DBS unless no decision other than removal is possible on the facts. Given that we have found that the DBS’s findings of fact on each of the Allegations was mistaken and given the findings of fact that we have ourselves made, there is no basis for RW’s name being included on either barred list. As such a direction for removal of RW’s name from both barred lists is the only appropriate disposal.

### **What happens next**

103. We therefore direct the DBS to remove RW’s name from each of the Adults’ Barred List and the Children’s Barred List.

**Thomas Church**  
**Judge of the Upper Tribunal**

**John Hutchinson**  
**Tribunal Member**

**Rachael Smith**  
**Tribunal Member**

Authorised for issue on 20 March 2025