IN THE UPPER TRIBUNAL **Appeal No. UA-2024-000840-V**
ADMINISTRATIVE APPEALS CHAMBER **[2025] UKUT 118 (AAC)**

On appeal from the Disclosure and Barring Service

Between:

Alfred Forzong

Appellant

- v -

The Disclosure and Barring Service

Respondent

Before: Judge Sarah Johnston, Sitting as a Judge of the Upper Tribunal, Josephine Heggie Specialist Member and Rachael Smith Specialist Member

Hearing date: 19 February 2025
Decision date: 31 March 2025

Representation:
Appellant: represented himself
Respondent: Mr Toby Fisher Matrix instructed by the DBS

ANONYMITY ORDER

On 6 September 2024, the Upper Tribunal made the following order, which remains in force—

> "3. Having considered the provisions of Rule 14(1)(b) of the 2008 Rules and the reasons given by the Respondent in the 25 July 2024 letter, I order prohibiting publication of any matter or disclosure of any documents likely to lead members of the public directly or indirectly to identify the following persons.
>
> a. [the client for whom the appellant was caring]
>
> b. [the son of that client].
>
> 4. Any breach of the order at paragraph [3] above is liable to be treated as a contempt of court and punished accordingly (section 25 of the Tribunals, Courts and Enforcement Act 2007).".

We have used ciphers for both in the decision—

a. The client for whom the appellant was caring is named as ES
b. ES's son is named as HC.

DECISION

1. The decision of the Upper Tribunal is to dismiss the Appellant's appeal.

2. The Respondent's decision taken on 28 March 2024 to include the Appellant's name on the Vulnerable Adults Barred List did not involve a mistake of fact or law and was not disproportionate.

3. This decision and the Orders that follow are given under section 4(5) and (6) of the Safeguarding Vulnerable Groups Act 2006 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS FOR DECISION

A summary of the Upper Tribunal's decision

1. We dismiss the appellant's appeal to the Upper Tribunal. We conclude that the Disclosure and Barring Service's decision does not involve a mistake of fact which is material to the barring decision or a mistake of law. We also conclude that on the evidence before us the decision was not disproportionate.

The rule 14 Orders on this appeal

2. The appellant did not wish to remain anonymous and so we make no Rule 14 order with respect to his name. The rule 14 Order at the head of this decision was made to protect the privacy of others involved in the appeal. We are satisfied that they should not be identified in this decision, whether directly by name or indirectly. Having regard to the interests of justice, we were accordingly satisfied that it is proportionate for the rule 14 order to remain in force.

3. In addition, the DBS have asked us to use ciphers for the two people we may refer to who are not the appellant to avoid any jigsaw identification of them. We do this throughout the decision.

The Barring Decision

4. This appeal concerns the barring decision of the DBS dated 28 March 2024 to include the appellant on the adults' barred list. The material facts were summarised in the letter.

5. The barring letter set out:

> "You shouted at [ES], threatening her: "let me tell you, if you do like yesterday, I will leave you and I will go". …. "If you do like yesterday, I will leave you and go home.

> On 2/3/2023, whilst working as her carer within her own home, you failed to respond to [ES], a vulnerable adult, promptly. You then lifted her up abruptly and dropped her back"

6. We had the video evidence seen by the DBS before the final decision was made. We watched this as part of the evidence in preparation for the hearing and in the hearing itself.

Permission to Appeal

7. Permission was granted by Judge Stout on the papers on 07 August 2024. At para 16 she says;

> "The appellant in his grounds of appeal identifies a number of matters that he contends amount to "mistakes of fact" in the DBS's decision. The appellant, who is representing himself without legal advice, does not expressly identify any ground of appeal based on error of law. However, it seems to me that at least some of his grounds of appeal (individually or cumulatively) should properly also be categorised as contending that DBS's decision to bar was in error of law as being disproportionate in the particular circumstances of the appellant's case given the matters that he identifies in his grounds of appeal."

8. Her decision was made on the basis that there is a realistic prospect of success that "there are arguable mistake(s) of law or fact in the decision of the DBS ...".

The statutory framework

9. Section 2 of the Act requires the DBS to maintain the adults' barred list. By virtue of section 2, Schedule 3 to the act applies for the purpose of determining whether an individual is included in the lists. Section 3 provides that a person is barred from regulated activity relating to vulnerable adults if the person is included in the adults' barred list. Regulated activity is determined in accordance with section 5 of, and Schedule 4 to, the 2006 Act.

10. Schedule 3 to the Act provides for inclusion by reference to "relevant conduct" by the person included in the lists. The appellant must have been engaged in relevant conduct and the regulated activity test must be met. That is, that the person is or has been, or might in future be, engaged in regulated activity relating to, in this case, vulnerable adults (paragraph 9(1)(a)(ii) of Schedule 3). Relevant conduct is defined in paragraph 10(1)(a) of Schedule 3 to the Act as conduct which endangers or is likely to endanger a vulnerable adult. Other elements of the definition are not relevant here. Endangers is defined in paragraph 10(2) of Schedule 3 as harming, causing to be harmed, putting at risk of harm, attempting to harm or inciting another to harm a vulnerable adult.

11. Section 4 of the Act governs appeals. It provides that an appeal may be made to the Upper Tribunal against a DBS decision only on the grounds that the DBS has made a mistake on any point of law or in any finding of fact which the DBS has made and on which the decision was based. Subsection (3) of section 4 provides that, for the purposes of subsection 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.

The grounds of appeal

12. The appellant set out his reasons for appealing which we summarise here.

a) The reasons he was shouting is that ES could not hear him. The words he used saying he will leave were not threats but referred to an earlier conversation where ES said she did not think he would return given how difficult she was the night before.

b) He did not delay in responding – the DBS said he took 3-4 minutes to respond but if that were the case he would not have appeared on the 4 minute video. There was only 4 minutes of footage and he was there for 12 hours the night before and 3 hours the night of the footage.

c) He did express remorse.

d) The DBS failed to take into account the fact that ES was very challenging and he should not have been there by himself, he was in darkness, he had worked 12 hours with ES the day before, and this was his 5th day of night shift. The company should not have let him go by himself; the staff after him were doubled up and still found it challenging.

e) ES did not complain: the complaint was made by her son with whom the appellant had disagreed the day before. Therefore, the DBS should not have relied on unlawfully obtained evidence.

f) The company paid the appellant to settle before the Employment Tribunal. The company therefore admitted they were at fault.

g) He did not give consent to being recorded and his company did not know he was being recorded. Therefore, the DBS should not have relied on unlawfully obtained evidence.

h) The DBS did not ask anything of the ES's daughter or of ES and therefore failed to investigate.

i)The DBS failed to take into account that no harm was done to ES.

j) The DBS failed to take into account the appellant had an unblemished history at the company and was highly valued.

The hearing

13. The DBS case relied on the four-minute video evidence, and the dismissal hearing by the company and the appeal of that dismissal. The appellant was dismissed for gross misconduct. Despite the appellant being with the patient ES for over 15 hours there was only four minutes of footage. We are told the camera automatically deletes anything that is not saved.

14. The video shows ES yelling for the appellant saying repeatedly: "no lights – you promised no lights." She also yells for her daughter. She leaves her bed which was on

the floor and shuffles round the back of the bed on her bottom having pushed away the Zimmer frame. Once on the floor she calls to the appellant to help a number of times in quick succession. He comes into view of the camera, walks straight towards her and picks her up from behind using her upper arms. She is surprised and distressed and yells “no” repeatedly. He then tells her to go to bed and guides her to the bed. He then lets her go but may be holding her hand and she falls back on to the bed whilst he was moving the cover. He tells her with his finger pointing to go to bed or he will leave. He tells her if she “does like last night” he will leave another three times. He assists her getting into bed and she says: “Can I have” and then the footage stops. The appellant told us he went to get her a warm bottle for her stomach and water to drink.

15. The appellant was representing himself. Given this we set out his evidence fully to ensure we have captured everything he wanted us to hear.

16. In his evidence he told us that the video is the only piece of evidence against him, it was obtained illegally as he did not consent to being recorded and was an abuse of his personal data. The DBS failed to investigate this and should not have relied upon illegally obtained evidence.

17. He told us the video is only four minutes, but he had been there for 15 hours over two nights by himself.

18. He said he had already been on three night shifts in a row and should not have been working but his manager said the family were desperate for help. The usual work of the company is support for those discharged from hospital and not those who are extremely agitated like ES.

19. On the first night which was a 12 hour shift, the appellant was concerned about ES’s breathing. She was saying she wanted to go to hospital and did not feel safe. The appellant called her son. He told the appellant not to call the ambulance despite ES asking him to as her son said she was “acting”. The appellant called his manager and after that conversation he called the ambulance as ES had capacity to make the request. ES’s son was annoyed and when the ambulance arrived, he talked the paramedic into not taking her to hospital on the telephone. He said to the appellant that he could not go to the hospital to organise things and that he and his sister had jobs to go to.

20. The next day his manager agreed that he should be doubled up with another staff member but there was no one available. He agreed to go and see what he could do. When he arrived, ES’s daughter was at the door. Both ES’s daughter and ES said that they did not think he would return given “she gave you a hell of a night”. ES said she would be “good” because if she behaved as she had the night before “you will go”. This was why the appellant said to ES that he would go as we saw on the video. He was referring to this conversation and his intention was to remind her of her promise.

21. In terms of the four minutes of video footage, the appellant said that ES’s bed was moved down to the floor so she could not fall out. The night before he had stood by her bed to make sure she did not.

22. As soon as ES's daughter left on the second night, she became agitated, was kicking things and shouting and he was trying to talk to her. He had to work in the darkness as ES did not want any lights on. ES's daughter had told him to keep the kitchen light on so he could see a bit. When ES wanted all the lights off, he also turned off this light and so he was in total darkness. He did not respond immediately to her calls as he did not know what to do to calm her down. He told us there had been hours of doing this over two nights and he was running out of options.

23. ES was on the floor by this time and the appellant was in the room, but she did not see him. She was yelling for him and got out of bed. She moved around the bed on the floor. The appellant went towards her and picked her up suddenly by the arms. She was clearly distressed by this. He said his immediate concern was that she was on a cold floor. He said he could not have used anything else to help her as she was too frail to use the chair or the Zimmer frame from the floor to pull herself up.

24. He moved her around the side of the bed. He leant over to move her cover so she would not sit on top of it, and she sat on the bed. He did not drop her. The DBS recognised this and retracted the allegation that he dropped her but said he did not support her into her bed. The appellant told us that this was not the only time she left her bed but, as there was only 4 minutes of video, this is all we see.

25. The appellant told us that he was here today as he does not take things lying down. He could not afford a solicitor and so he was representing himself. He believed the DBS did not do their job as they failed to investigate properly given the serious impact it had on him.

26. After receiving the video, the company held a disciplinary hearing and the appellant was dismissed. This decision was upheld in an appeal hearing. The appellant told us that at his appeal hearing with the company he was told if HC, ES's son, had not gone to the CQC and others the outcome would have been different, but they needed to protect the company image. He sets this out in a letter to the company dated 11 May 2023 which we had before us today. In it he said he was told, "The outcome would have been different if he did not take that route. CQC, safeguarding agency, police, it's hard for all of us." He told us that he never received a response to the email.

27. In dismissing the appellant, the company recognised his previous good service and the difficult circumstances he found himself in but determined that the video showed a poor episode of care. The panel considering the case was made up of three people including a former director of Adult Social Care and Children's Services, an experienced retired GP and another person who is said to have had considerable experience of a number of roles including school governor and related knowledge of safeguarding. He appealed but the dismissal stood. A letter from the CEO of the company dated 5 May 2023 from the care agency telling the appellant of the outcome of the appeal said this:

> "The video evidence was clear and compelling, showing a very poor episode of care and included the following:-
>
> A failure to respond in a prompt manner to multiple requests for help.
> Prior to "lifting" the lady from the floor, there was no conversation with her about what was happening and explaining to her what was to be done. She was

> obviously clearly distressed and disorientated and the actions that followed would only have made that situation worse.
>
> I considered the "lifting" to be rough and to not follow policies and procedures and to also not be consistent with the relevant training that had been given to you. You are a well trained and experienced employee so would have known the correct way to do things.
>
> I then found the way the lady was returned to her bed to again be unacceptable and not in line with standards as noted above and I also found the way the lady was spoken to, to fall into the same category.
>
> What we saw in the video was an episode of very poor care and practice in which a number of considerable errors occurred one after the other."

28. The appellant told us that the training on lifting was eLearning. There was no opportunity to learn how to lift in person and no opportunity to practise. Although there the information before us was that he was observed as well, this was for another patient who was using a wheelchair and he would help her from the bed to the wheelchair. He held her under her shoulders. In the bundle was the certificate for moving and handling and the appellant got a score of 100%. The certificate says that the course includes mobility, weight bearing, balance and fall prevention.

29. When he was asked by the Tribunal what he would do in the same situation now, he said "I would have left her on the floor." However, when questioned by Mr Fisher, he was very clear that he would not have done anything differently.

30. In cross examination the appellant denied he failed to respond promptly, that the way he lifted ES caused her distress and that he failed to support her onto the bed. He said he was in total darkness and so could not see what ES was doing and could not see her leaving the bed. In cross examination Mr Fisher pointed out that the appellant went straight to her and appeared to be able to see. In response to a question as to why he did not respond to her when she called him 8 times, he said he did not know what to do. He had been back and forth to comfort her for hours and had run out of options. The night before he had stood for 12 hours by her bed to make sure she did not fall. He said he was not threatening her when he told her if she carried on behaving like this he would leave.

31. The appellant told us that he had a good history with the company and was considered a valued member of staff. This was clear from the investigations into his care. He told us he had been accused of stealing a client's bank card and this was extremely stressful, but the family had found it at a later date. He said he often suffers racism from clients who do not like his colour and talk to a more junior member of staff because they are white.

32. In his submissions, the appellant likened his case to the videos taken of police in Manchester who were detaining people at the airport. By only seeing the videos taken by those arrested so much was missed of their behaviour before this happened. This supported his submission that we could not rely on the 4 minutes of footage out of about 15 hours.

33. We include consideration of Mr Fisher's submissions in the analysis of the case below.

Analysis of evidence

34. In this case most of the grounds of the appeal are alleged mistake of fact, some of which may give rise to an error of law. Relevant here is the summary set out in PF v Disclosure and Barring Service [2020] UKUT 256 (AAC). At para 51. the Tribunal say;

> "a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).
>
> b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.
>
> c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.
>
> d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).
>
> e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.
>
> f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.
>
> g) The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker."

35. In terms of ground a) above, we accept that the situation that the appellant found himself in was clearly very challenging. It was recognised by his company that he should not have been there by himself. He was the last staff member to be sent alone. We accept that it is more likely than not that the appellant was raising his voice when

he spoke as ES was hard of hearing. However, the video evidence is clear that the appellant threatened ES.

36. He threatened ES 4 times. The words he used were;

> "Let me tell you. If you do like this again, I will leave you and I'll go."
>
> "Now, if you do that I will leave you. I will go home."
>
> "If you do that I will go. I will leave you alone".
>
> "If you do like yesterday, I will leave you and I will go home"

37. The appellant said this referred to an earlier conversation with ES and her daughter where they told him they thought he would not return that night. We fail to see how this makes a difference; it is clear that these were threats and ES believed them as evidenced by her behaviour. Threatening to leave a vulnerable woman by herself is clearly distressing and causes her psychological harm.

38. It is also clear from the video that the appellant lifted ES without warning and not in line with the expected techniques. He lifted her by pulling her up by her upper arms which could have resulted in physical harm to her. Mr Fisher submitted that the DBS acknowledged one mistake of fact in that the appellant did not drop ES back onto her bed. However, he said that this is immaterial to the decision and the appellant did not support her into bed and she fell onto the bed. We agree.

39. In terms of the lift, it appears the appellant was trained to lift although only through eLearning. We saw for ourselves that the lift was without warning and that ES was distressed by it. In the letter from the CEO who decided the appeal against the initial panel's decision to dismiss, the original panel's experience is outlined as follows;

> "A former Director of Adult Social Care and Children's Services with particular experience around safeguarding and care.
>
> An experienced retired GP of many years standing with considerable knowledge of health and social care and safeguarding around vulnerable adults.
>
> Someone with considerable experience of a number of roles including school Governor and again related knowledge of safeguarding."

40. It appears therefore they were experienced and knowledgeable about safeguarding and more likely than not appropriate lift techniques. In support of this is the evidence of the appellant's manager who said this: "Picking up [ES] like that is simply wrong. There was no attempt to use alternatives, for example the nearby frame. … Limited space does make moving and handling difficult but no excuses for lifting like this."

41. We therefore find that the appellant did threaten ES and did lift her suddenly and in an unsafe way. The DBS made no mistake of fact in coming to this conclusion.

42. In terms of ground b) above the appellant says he did not delay in responding to ES when she called for him – the DBS said he took 3-4 minutes to respond. He said if that were the case he would not have appeared on the 4 minute video. There was only 4 minutes of footage, and he was there for 12 hours the night before and 3 hours the night of the footage. The barring decision letter says: "You are seen to respond to her after a delay of 3 – 4 minutes, then abruptly pick her up without warning and drop her back on the bed." As said above the DBS have withdrawn the allegation that the appellant dropped ES on her bed. They say he did not support her. The DBS accept that the appellant at 1 min and 8 seconds into the video recording answered her requests for the lights to be turned off. He physically goes towards her at 3.05. Given this we find that he did not delay in assisting ES to any great extent.

43. We accept the evidence of the appellant that he was running out of options and was thinking about how to respond. Getting out of the bed was not dangerous to ES as the bed was on the floor. We accept that the appellant was in the room and watching ES. However, we find even if this is a mistake of fact it is not material to the decision given our finding that the appellant did threaten the ES and lifted her in an unsafe way.

44. In terms of ground c) the appellant said he expressed remorse. We do not accept this. He was clear today that the way he lifted ES and the threats he made to her were justified. He said if he was in the same situation he would not do anything differently.

45. In terms of ground d) that the DBS failed to take into account ES was very challenging, the appellant should not have been there by himself, he was in darkness, he had worked 12 hours with ES the day before, and this was his 5th day of night shift. The appellant says the company should not have let him go by himself; the staff after him were doubled up and still found it challenging. We agree that the evidence is he should not have gone to assist ES alone. This was recognised by his manager when she offered the appellant the shift on the second day. After this incident the company made sure that two carers attended.

46. However, we do not find the DBS made a mistake of fact or law in coming to the decision despite the challenges the appellant faced. The DBS do recognise that the situation was challenging for the appellant in the decision letter. "The DBS acknowledged your previous track record of five years with no complaints and that you had acted appropriately in a challenging situation with [ES] for 12 hours on the previous night." The fact that the shift was challenging does not affect the fact that the threats or unsafe lifting occurred. The DBS were entitled to find that the lift and the threats were relevant conduct under Schedule 3 of the SVAA in that the conduct was likely to endanger a vulnerable adult.

47. In terms of ground e) ES did not complain: the complaint was made by her son with whom the appellant had disagreed the day before. We agree with the DBS that this ground must fail. How the evidence came to the DBS is not relevant to their finding of relevant conduct. Their remit is to safeguard vulnerable adults and the provenance of the evidence in this case is irrelevant unless it affected the credibility of it. As we have the video recording of the threats and the unsafe lift, the credibility is not in question. Even if ES's son was complaining out of some sort of malice, given the appellant had not agreed with him the day before, it is not his evidence that the DBS relied upon. It was the video. The DBS did not make a mistake of law or fact relying on this evidence.

48. In terms of ground f) the appellant says that the company paid him money in settlement of his claim before the Employment Tribunal. The agreement is in the bundle. This is not relevant to the DBS who are exercising a safeguarding function. They had objective video evidence of conduct of the appellant on which they relied. They made no mistake of law or fact in barring the appellant on the evidence before them or before us today.

49. In terms of ground g) the appellant contends that he did not give consent to being recorded and his company did not know he was being recorded. He says because of this the DBS should not have relied on the video evidence. The DBS is not a court of law where admissibility of evidence is proscribed. The video stands as objective evidence and so by relying on it the DBS made no mistake of fact or law. Their function is to protect vulnerable adults and on the evidence before them, there was no mistake of fact or law.

50. In terms of ground h) the DBS did not ask anything of ES's daughter or of ES. Whilst that is a fact it would not have changed the video evidence before them and before us today. They were entitled to rely on the evidence in the video.

51. In terms of ground i) the appellant says no harm was done to ES. It is clear to us that ES was distressed which is psychological harm. It is also clear that given the way she was lifted it is likely that she could have suffered physical harm. Given that the appellant says he would do the same thing again, it is likely that another vulnerable adult would suffer physical or emotional harm if the appellant was not barred. The DBS made no mistake of fact or law on this ground.

52. In terms of ground j) this is related to proportionality. Given the appellant had an unblemished history and was in challenging circumstances without appropriate support, was the decision of the DBS to include the appellant on the barred list disproportionate? If it was, it is an error of law.

53. We were fortunate to have the benefit of the decision in KS v Disclosure and Barring Service [2025] UKUT 045 (AAC) which was issued on 7 February 2025. This case was heard by a panel comprising two judges and a specialist member, appointed to decide the proper approach for the Upper Tribunal to take on the issue of proportionality of a decision of the DBS. It is therefore the approach we will follow in deciding whether the decision to include the appellant on the vulnerable adults' list was proportionate given it is an interference with his Article 8 rights. Article 8 is a qualified right and so interference is permitted in accordance with the law and if it is necessary in a democratic society.

54. The DBS set out their consideration of proportionality in the final decision letter:

> "It is acknowledged that you worked as a support worker for five years with no concerns raised previously. It is also acknowledged that you have all the relevant training to care for a challenging vulnerable adult such as [ES].
>
> However, the DBS currently has no guarantee that this behaviour would not be repeated with a risk that you could move and handle vulnerable adults incorrectly, shout, then verbally abuse them causing both physical and emotional harm.

> The DBS have significant concerns about this harmful behaviour carried out within regulated activity as this may be repeated should you continue to be engaged in any regulated activity in the future. The safeguarding concerns raised by this behaviour have been considered by your employer to be serious and resulted in your dismissal.
>
> On balance, a decision to include you in the Adults' List is the only certain measure that will protect vulnerable adults. This is because the provision of basic safeguarding protection and care is considered fundamental within regulated activity. There are concerns that you may fail to provide the basic care and safeguard the needs of any vulnerable group who relied upon you for protection - therefore it is considered appropriate to include you in the Adults Barred List.
>
> Consideration has been given to the interference into your private life in line with Article 8 of the European Convention on Human Rights 1998 and it is acknowledged that a bar will prevent you from working and extending your career within this chosen profession as a support/care worker working with vulnerable adults, thereby limiting the career options available to you and your ability to earn an income.
>
> However, on balance and in order to safeguard vulnerable groups, it is considered both appropriate and proportionate to include you in the Adults' Barred List."

55. The panel comprising two judges and a specialist member in KS determined that the Upper Tribunal shall apply the proportionality analysis by addressing four issues as formulated by Lord Reed in *Bank Mellat v Her Majesty's Treasury* (No 2) [2014] AC 700. We follow their guidance here.

(1) Whether the objective measure is sufficiently important to justify the limitation of a protected right.

56. Paragraph 58 of KS: "The measure is the barring scheme under SVGA and DBS's decision under that scheme. Its objective, in the most general terms, is to protect children and vulnerable adults from harm by those entrusted with their care in regulated activity." In this case the objective of adding the appellant to the Adults' Barred List is sufficiently important to justify interfering with the appellant's exercise of his Article 8 Convention right.

(2) whether the measure is rationally connected to the objective

57. The DBS's decision under the barring scheme prohibits the appellant from engaging in regulated activity. This is rationally connected to the barring scheme.

(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective.

58. As in KS there are only three options open to the DBS. "It may: (a) include the person in one of the lists, but not the other;(b) include the person in both lists; or (c) decide not to include the person in either list. It has no power to limit the extent to which the bar applies. It cannot apply a temporary bar while it investigates the case or limit the scope of the bar to specified types of regulated activity. Nor can it permit a person to engage in regulated activity but subject to conditions." (para 61 KS).

59. In this case if the appellant could have been subject to conditions, for example, only working with another carer for a specified period and attending training on lifting, the imposition of a barring order may have been disproportionate. However, given those options are not available, the only option for the DBS was to bar the appellant from working in regulated activity with vulnerable adults.

(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter

60. The effect that the barring order has on the appellant is significant. This may have been disproportionate given the appellant's impeccable history, the fact that he was not supported by his company, that he had worked five night shifts in a row and ES was particularly challenging to care for, if he had showed some remorse and willingness to address the behaviour. However, when asked in cross examination whether he would do anything differently were he to be faced with the same situation again, he said firmly that he would not. He clearly believed that how he behaved to ES did not cause or was likely to cause her harm. It clearly did. Given this, and the harm he could cause to another vulnerable adult should he behave in the same way, barring the appellant from regulated activity with vulnerable adults is proportionate and the only way under the legislation to achieve the objective.

Disposal

61. It follows from our reasons as set out above that the appellant's appeal to the Upper Tribunal is dismissed.

Sarah Johnston
Sitting as a Judge of the Upper Tribunal
Josephine Heggie
Specialist Member of the Upper Tribunal
Rachael Smith
Specialist Member of the Upper Tribunal

Authorised for issue on 31 March 2025