



UA-2024-000114-V
[2025] UKUT 270 (AAC)

**THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

YN

Appellant

- v -

Disclosure and Barring Service

Respondent

Before: Judge Sarah Johnston sitting as a Judge of the Upper Tribunal, Tribunal Member Elizabeth Stuart-Cole, Tribunal Member Elizabeth Bainbridge

Decision date:

Hearing date: 13 May 2025

Mode of hearing: CVP

Representation:

Appellant: Represented herself

Respondent: Tim Wilkinson instructed by DAC Beachcroft

On appeal from:

the decision of the DBS communicated

in a letter dated: 10/10/2023

DBS reference: 01012303220

ANONYMITY ORDER

1. On 30 August 2024, the Upper Tribunal made an order protecting the following people's identity. The Upper Tribunal now remakes the order and adds to it anonymising the names of the witnesses in the written evidence who made statements. Given that this decision will be published, we anonymise using descriptions rather than names.
2. Pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, and for the reasons the DBS gives in its letter of 1/8/2024, the tribunal grants the application and prohibits the disclosure or publication of:
 - A. The names of the following individual or
 - B. Any matter likely to lead members of the public to identify any of them:

JA – the person who was cared for by the agency
HG – the carer with the appellant who told her not to use the oil
KG – the carer who was with HG the next day and to whom JA made the disclosure

ACF – the carer on duty with the appellant at teatime
 MJ – the carer on duty with the appellant in the evening
 SD – an employee of the care agency
 YN – the appellant

3. Any breach of the order at paragraph 2 above is liable to be treated as a contempt of court and punished accordingly (section 25 of the Tribunals, Courts and Enforcement Act 2007).

SUMMARY OF DECISION

Safeguarding Vulnerable Groups: Adults’ barred list (65.2), Children’s barred list (65.1), Appeal allowed; mistake of fact in DBS decision (65.9), Directed removal from list (65.19).

The decision of the Tribunal was that there was a mistake of fact in the DBS decision in finding that an allegation against the appellant was proved. The appeal was allowed, and the Tribunal directed the appellant should be removed from the Adults’ Barred list and the Children’s 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 judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The DBS made a mistake of fact in finding the allegation against the appellant proved. The appellant must be removed from the children’s barred list and from the adults’ barred list.

REASONS FOR DECISION

Introduction

1. This is an appeal against the DBS decision to include the appellant in the adults’ and children’s barred lists. The appellant challenges the factual finding of the DBS which led to her being included in the lists. Permission to appeal was granted on the basis that it was realistically arguable that oral evidence could show that the DBS made material mistakes in its finding of fact.

Factual background

2. The DBS sent their final decision letter to the appellant on 10 October 2023. They included the appellant on both the barred lists because they were satisfied that;

“On 01/07/2023 whilst working as a Carer for Nurse Plus, you ignored company policy and inserted your fingers into the rectum of [JA], a 93 year old service user, to relieve her constipation, without consent resulting in discomfort, and then provided false information about the vulnerable adult.”

3. There were several statements on which the DBS relied. The appellant has always denied the allegation.

4. The first relevant statement in terms of the timeline of the day came from HG who, when asked, sent an email to the company for whom the appellant and HG worked. It says that during a lunch call on 1 July 2023 the appellant came into the kitchen to look for oil to put on her finger. She said she was going to insert her finger into JA's bottom to help relieve her constipation which was causing her pain. HG told her not to do this as it is against company protocol. HG says in the email that once she had told the appellant not to do this, "That was the end of that". She goes on to say that on 2 July 2023 that JA had told her and another carer that her bottom was sore as the carer the night before had inserted her finger in her bottom. That this was said was confirmed by the other carer KG in an email dated 2 July 2023. She said, "[JA] expressed to me that yesterday she has been very constipated, and a carer had put her finger in her rectum to help."
5. ACF, who visited JA with the appellant at teatime on 1 July 2023, said in an email that he assisted JA to walk to the commode where he left her to use the commode. She told him she was in a lot of discomfort with her stomach because she had not been to the toilet in a little while and asked him to find suppositories her daughter had brought for her. He told her he could not insert suppositories and she should have another laxido and she agreed but reiterated how much discomfort she was in. The appellant was not in the room at this time.
6. On 1 July 2023 MJ visited JA with the appellant in the evening when the allegation was said that have occurred. In an email dated 03 July 2023, in response to a query from the care agency, MJ said that the appellant had pushed the hoist causing it to tip with JA in it. The DBS found this allegation unsubstantiated and did not rely on it to bar the appellant. This does not make up part of the decision of the DBS. She said that the appellant was assisting JA with personal care, and she was in the kitchen preparing medication, washing up and making drinks. She then assisted the appellant in helping JA into bed. This email refers to the 30 June 2023, but the appellant agrees that MJ was at JA's house with her the evening of the allegation. MJ does not mention anything about JA calling out or that she said anything about the allegation.
7. The appellant also provided a statement. She says that on the lunchtime visit JA told her she was constipated and "in extreme pain". She said that HG had said that might have happened because she did not take laxido regularly. She was providing the personal care and went to the kitchen and asked HG if there was any oil to put on JA's bottom to make it easier to go. HG told her that they were not allowed to do this. She said she went back to JA, cleaned her with wipes and put "sudocaim" and a fresh pad on. At the teatime visit she did not provide the personal care. In the evening, she did provide the personal care and she said that she walked JA to the commode, JA said she was in terrible pain and she asked her to find some special stick she bought recently to help her to go. The appellant told her that there was nothing she could find but in fact she did not look for it. When JA stood up from the commode the appellant says in her statement "...I saw that big part of poo come out. I wiped the bottom with toilet paper and it dropped down to the commode I told [MJ] that she do not laxido". She then cleaned her and put "sudocaim" on and a night pad. She was questioned by Counsel for the DBS about her statement that JA could have mistaken the pain she was feeling from passing hard stools with someone inserting fingers into her bottom. It was suggested to her that this was unlikely but she maintained she did not use her fingers to help relieve JA's constipation and that pain from passing

hard stools for a 93 year old who was severely constipated could hurt the next day.

8. On 5 July 2023 the appellant made the decision to leave the company. The DBS took as significant the fact that the appellant appears to have resigned during the investigation.
9. On 06 July 2023 SD from the agency reported the alleged incident to the police. SD reported that JA has expressed that the appellant had inserted a finger into her rectum in an attempt to relieve constipation without consent. She told two carers HG and KG the next day. They checked with the community response team about an examination, but they advised that they would not need to do this unless there was blood in her bowels or she deteriorates. The agency rang JA and asked if she consented to this and she said, “no in didn’t consent I just said no no when it happened”. As well as reporting this to the police the agency notified Adult Health and Social Care, told family, reported the matter to the police and referred the appellant to the DBS.
10. At the hearing today the appellant us that JA’s home was a small two bedroom bungalow. All three people there can hear everything that happens in the house. She confirmed to us what she had said in her statement about what happened in the evening when she was providing personal care to JA. She said the whole process takes 30 minutes and had she done what was alleged this would have increased the time the team was there. There is no report that it took longer from MJ who was with the appellant in the evening. She also explained to us that it would be impossible to reach JA’s bottom when she is on the commode. Had she performed the procedure she would have needed to do this more than once with gloves, probably when JA was lying down as she was too unstable when standing. She would have been seen by the other carer, MJ would have heard JA call out as she said she did and JA said nothing to MJ when she came into the bedroom to help the appellant get JA to bed.
11. She also told us that she was not looking for oil to insert her fingers but just to put on her bottom to help the faces move more easily. At the time she did not know the word “insert” in English so would not have used it. It may have been that HG misunderstood her due to her knowledge of English at the time.
12. The appellant was an obstetrician and gynaecologist in Russia. In her work there oil was used to soften the skin around the genital area. When JA was in such pain she went to look for oil to help alleviate her pain but when she was told she could not use it she did not. She said she had not performed the procedure before.
13. She clarified that JA had asked for the special stick later in the day to help relieve her constipation but that she had not looked for it. She had been told it was against company policy and so that made it easier for her. It is hard to watch someone in pain – JA was crying on the commode in pain.
14. She was asked if she had relieved a patient’s constipation with oil and her fingers before. She said she had not but she had googled it to find out.

15. Counsel for the DBS put to her that none of those who reported this to the agency had any axe to grind and therefore there was no reason they would have made this up.
16. The appellant submitted that there was no one who had seen her do what is alleged. MJ was the carer with her and did not mention that JA said “no no” as she said she had. MJ also had contact with JA when she assisted the appellant the same evening to get JA to bed. JA did not tell MJ that this had happened then. Counsel submitted that this was because she would have had to do this in front of the appellant.
17. Counsel submitted that it is unlikely that JA would have been mistaken. In response the appellant gave two examples of situations where JA had thought something had happened when it had not. In early June 2023 she was asked to write a report when JA was found on the floor. JAs walker is put out of her reach so that she does not try and walk unassisted as she is not stable enough. She forgot this and got up to go to the toilet and fell on the floor and was there when the carer’s arrived. In mid-June when the appellant was caring for JA she said that she had been let alone for 6 hours. The appellant rang the agency, and this was not the case – the carers had been. The appellant therefore submitted that she did get confused.

Legal framework

18. The relevant legislation is in the Safeguarding Vulnerable Groups Act 2006.
19. Section 2 of the Act requires the DBS to maintain the children’s and vulnerable adults’ barred lists. By virtue of section 2, Schedule 3 to the Act applies for the purpose of determining whether an individual is included in the list. Regulated activity is determined in accordance with section 5 of, and Schedule 4 to, the 2006 Act. The appellant was clearly engaged in regulated activity when she was a carer.
20. Schedule 3 to the Act also provides for inclusion by reference to “relevant conduct” by the person included in the list. By virtue of paragraph 3(3) of Schedule 3, the DBS must include the person in the children’s barred list if the DBS is satisfied that the person has engaged in relevant conduct, and the DBS has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and the DBS is satisfied that it is appropriate to include the person in the list. Relevant conduct is defined in paragraph 4 of Schedule 3 as: conduct which endangers a child or is likely to endanger a child; or conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him; or conduct involving sexual material relating to children (including possession of such material); or conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to the DBS that the conduct is inappropriate; or conduct of a sexual nature involving a child, if it appears to the DBS that the conduct is inappropriate. [Paragraph 4(2) of Schedule 3 provides that a person’s conduct endangers a child if the person: harms a child; or causes a child to be harmed; or puts a child at risk of harm; or attempts to harm a child; or incites another to harm a child.]

21. 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, whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.
22. Counsel referred the Tribunal to the case of Disclosure and Barring Service v RI [2024] EWCA Civ 95. Where an appellant gives oral evidence that stands up to cross-examination such that it is considered credible it is open to the Tribunal to accept his or her case on the balance of probabilities and overturn the decision.

The grounds of appeal and the parties' submissions

23. We agree with Counsel for the DBS that the grounds for appeal in this case rest on a straightforward dispute. The appellant says she did not do the alleged act and the DBS says on the balance of probabilities given the evidence before them she did. The appellant's grounds of appeal allege a mistake of fact and it was on that basis that UTJ Citron granted permission to appeal on 12 November 2024.
24. In summary the appellant says she was looking for oil in the kitchen at the lunchtime visit to rub on JA's rectum to help alleviate her constipation. When she was told she could not do this by HG she did not. Noone saw her doing this but the next day JA said that the carer the night before had inserted her fingers into her bottom and it hurt.

Analysis

25. We find that it could not be proven on the balance of probabilities that the appellant did in fact insert her fingers into JA's rectum. No one witnessed this and there are credible explanations by the appellant to prove she did not in fact do this.
26. She saw JA three times that day and twice gave her personal care. She explained that the house was small and so everything that was said would be heard by all those in the house. There was no evidence to the contrary from the DBS. It was in the evening visit that she is said to have tried to relieve JA's constipation by putting her fingers into JA's rectum. JA said in a telephone call the next morning from the agency that when the appellant did this she said "no no".
27. We do not find on the balance of probabilities that the allegation is made out for a number of reasons. MJ did not hear JA's protestations despite the fact that everything could be heard in the small house by all those there; JA did not tell MJ what had happened that evening when she came into the room just after the incident was said to have occurred. Counsel for the DBS submitted that this was because JA would not do this in front of the appellant but there is no evidence that she was scared of the appellant and no evidence about why she would not do this.
28. Counsel for the DBS said it is not likely that JA got this wrong. The appellant gave us two examples of when JA was confused in June 2023, one where she said she had not been visited and one where she tried to walk when she is unable to

do this unassisted set out in para 17 above. We find that the alternative explanation that JA was sore because of the constipation and passing a hard stool more credible. It is highly likely that she heard the conversation about the oil and was mistaken. She asked twice that day for different interventions that would have meant that something was inserted in her rectum, the suppositories and then a stick. Given her age, her distress, pain and the events of the day and the evidence of the appellant we find it is more likely than not that she remembered wrongly what had happened.

29. The appellant gave a credible account of what did happen when she was providing personal care in the evening. She said when JA stood up from the commode there was a stool in her bottom. She wiped this off and then applied the cream. She had been constipated for some time and was in pain so it is likely that passing that stool would have caused pain. Counsel for the appellant questioned her about whether the pain of a hard stool would still be felt the next morning. There was no evidence that this would not be the case.
30. We found the appellant a credible witness. Counsel for the DBS said that the appellant did not answer simple questions. We disagree. She explained what happened clearly and consistently and she has done this since the allegation was made. She came across as compassionate and concerned about JA. She was clear she did not do this and had not done the procedure before. She explained that in Russia oil was used to soften skin but when she was told not to use it she did not. She has maintained this throughout. She says she never intended to insert a finger into JA's rectum – just use some oil to soften the skin.
31. We have not heard from the other carers who made statements as they were not called by the DBS. However, no one saw the alleged act. Counsel said these carers had no animosity towards the appellant and would not have made this up. We agree. HG believed that the appellant had looked for oil to allow her to insert her fingers into JA's rectum. We believe the appellant that she did not know the word insert in English at that time and this could have easily been a misunderstanding due to language differences. We do not doubt that JA said the incident happened to HG and KG. But we find in light of the appellant's credible evidence that she did not do this, the evidence of JA's distress, her pain and the other occasions when she became confused that on the balance of probabilities the allegation is not proved.

Conclusion

32. The appeal is allowed. We direct that the appellant must be removed from both the adults' barred list and the children's barred list.

Sarah Johnston
Sitting as a Judge of the Upper Tribunal
Tribunal Member Elizabeth Stuart-Cole
Tribunal Member Elizabeth Bainbridge

Authorised by the Judge for issue on 04 August 2025