**Neutral Citation Number: [2025] UKUT 303 (AAC)**
**Appeal No. UA-2024-000235-V**

**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**EAO**

**Appellant**

**- v -**

**Disclosure and Barring Service**

**Respondent**

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| **Before:** | **Upper Tribunal Judge Church and Tribunal Members Bainbridge and Graham** |
| **Hearing date:** | |
| **Mode of hearing:** | **Face-to-face hearing at Field House, London** |

**Representation:**

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| **Appellant:** | In person |
| **Respondent:** | Mr R Ryan instructed by Ms Natalie Mason (of DBS legal department) |

*On appeal from:*

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| Decision maker: | The Disclosure and Barring Service |
| Reference No: | 010004796300 |
| Decision Date: | 29 September 2023 |

**RULE 14 Order**

**Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings. This order does not apply to: (a) the appellant; (b) any person to whom the appellant discloses such a matter or who learns of it through publication by the appellant; or (c) any person exercising statutory (including judicial) functions where**

**knowledge of the matter is reasonably necessary for the proper exercise of the functions.**

## SUMMARY OF DECISION

**SAFEGUARDING (65)**
This case is about proportionality. Following the approach confirmed by the Presidential Panel of the Upper Tribunal in ***KS v Disclosure and Barring Service*** [2025] UKUT 45 (AAC), we considered for ourselves whether DBS's decision to place the Appellant's name on Adults' Barred List was proportionate, given the factual findings it had made, which the Appellant had accepted.
We decided that the DBS's decision was proportionate and therefore dismissed the appeal.

***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 dismiss the appeal.** The decision of the Disclosure and Barring Service did not involve any material mistake of fact or law. It is confirmed.

## REASONS FOR DECISION

### Introduction

1. This appeal is about the decision of the Disclosure and Barring Service (**"DBS"**) made on 29 September 2023 to place EAO's name on the Adults' Barred List (the **"Barring Decision"**).

### Factual and procedural background

2. The DBS reached the Barring Decision on the basis of findings that EAO had engaged in 'regulated activity' for the purposes of the Safeguarding Vulnerable Groups Act 2006 (the **"SVGA"**) by reason of having worked as a support worker, and she had engaged in 'relevant conduct' in relation to vulnerable adults for the purposes of the SVGA because between 2020 and 2022 she used Oyster cards belonging to vulnerable adult service users for her own travel and on 3 February 2020 she pretended to spit at a vulnerable adult service user.

3. EAO considered the Barring Decision unduly harsh and she completed a UT10 form to apply to the Upper Tribunal for permission to appeal it. She asked for an oral hearing of her permission application. The matter came before me and I directed a "rolled up" oral hearing to decide whether to grant an extension of time to admit EAO's late application and, if so, whether to grant permission to appeal.

4. At the oral hearing, EAO explained how she came to make her application after the deadline for an in-time application, and I was persuaded that the interests of justice favoured my exercising my discretion to extend time and admit her application.

5. At the hearing, EAO accepted that she did the things that the DBS had said that she did (using service users' Oyster cards for her own personal travel and pretending to spit at a service user). While she maintained that her employers' procedures for use of service users' Oyster cards were somewhat unclear and she had been told by a colleague to use service users' Oyster cards for her own travel, she accepted that the things she had done were wrong and she said that she regretted them.

6. When I asked her whether her case was that she didn't realise that her conduct was wrong at the time, but now realised that it was, she told me frankly that she did know it was wrong at the time, but she didn't think that she would get caught. However, she said that she now regrets her behaviour and has learned her lesson and would never do such things again.

7. EAO disputed whether her actions in using service users' Oyster cards and pretending to spit at a service user (in order to discourage the service user from spitting at her) endangered any vulnerable adult or would be likely to endanger any vulnerable adult. However, I decided that it was not realistically arguable that the DBS's finding that they did amount to 'relevant conduct' was mistaken.

8. I was persuaded to grant permission to appeal on the sole ground that the Barring Decision may not have been proportionate.

9. I made directions and listed the matter for a face-to-face hearing of the substantive appeal before a panel of a judge and two expert members.

## Legal framework

<u>The statutory scheme</u>

10. There are multiple gateways under Schedule 3 to the SVGA to a person's name being included on a barred list.

*The 'relevant conduct' gateway*

11. In this case the DBS relied upon the 'relevant conduct' gateway. That required the DBS to be 'satisfied' of three things:

    a. that EAO was at the relevant time, had in the past been, or might in future be 'engaged' in, 'regulated activity' in relation to vulnerable adults (see paragraph 9(3)(aa) of Schedule 3 to the SVGA);

    b. that EAO had 'engaged' in (see paragraph 9(3)(a) of Schedule 3 to the SVGA) 'relevant conduct' (defined in paragraph 10); and

    c. that it was 'appropriate' (and proportionate) to include EAO on the barred list (see paragraph 9(3)(b) of Schedule 3 to the SVGA).

12. If the DBS was satisfied of all three matters above, it was required to place EAO's name on the Adults' Barred List.

*The Upper Tribunal's jurisdiction under the SVGA*

13. Section 4 of the SVGA 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 SVGA).

14. An appeal under section 4 SVGA may only be made with the permission of the Upper Tribunal (see section 4(4) SVGA).

15. 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 SVGA). 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.

16. Following ***DBS v AB*** [2021] EWCA Civ 1575 (***"DBS v AB"***), the usual order will be remission back to DBS unless no decision other than removal is possible on the facts.

17. 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.

18. Section 4(3) SVGA provides that, for the purposes of section 4(2) SVGA, 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

19. The relevant principles regarding factual mistakes have been set out in several recent decisions of the Court of Appeal (see ***PF v DBS*** [2020] UKUT 256 (AAC); ***DBS v JHB*** [2023] EWCA Civ 982; ***Kihembo v DBS*** [2023] EWCA Civ 1547; and ***DBS v RI*** [2024] EWCA Civ 95). These decisions are binding on the Upper Tribunal.

20. In relation to whether it is 'appropriate' to include a person in a barred list, the Upper Tribunal has only limited powers to intervene. This is clear from the section 4(3) SVGA and relevant case law. The scope for challenge by way of an appeal is effectively limited to a challenge on proportionality or rationality grounds. The DBS is well-equipped to make safeguarding decisions of this kind (***DBS v AB*** (paras 43-44, 55, 66-75)).

21. At paragraph [55] of ***DBS v AB***, the Court cautioned:

> "[The Upper Tribunal] will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter…".

and 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".

22. In the subsequent Upper Tribunal case, ***AB v DBS*** [2022] UKUT 134 (AAC), the Upper Tribunal decided (albeit in the context of a case that was based on the 'risk of harm' rather than the 'relevant conduct' gateway) that ***DBS v AB*** meant that the Upper Tribunal could consider, on appeal under the SVGA, a finding of fact by DBS that an individual poses "a risk" of harm but not a DBS assessment of the "level of the risk posed" (see [49]-[52] and [64]).

23. A Presidential Panel of the Upper Tribunal was convened in ***KS v Disclosure and Barring Service*** [2025] UKUT 45 (AAC) (***"KS v DBS"***), to consider the proper approach to assessing whether a decision of the DBS was "proportionate". It confirmed that the Upper Tribunal must assess the proportionality of the DBS's

decision for itself, rather than carrying out a rationality or Wednesbury assessment of the DBS's assessment of proportionality (see ***KS v DBS*** at [50]).

24. When considering appeals of this nature, the Upper Tribunal:

> "must focus on the substance, not the form, and the appeal is against the decision as a whole and not the decision letter, let alone one paragraph…taken in isolation": *XY v ISA* [2011] UKUT 289 (AAC), [2012] AACR 13 (at [40]).

25. 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]).

26. The statement of law in ***R (Iran) v Secretary of State for the Home Department*** [2005] EWCA Civ 982 indicates that materiality and procedural fairness are essential features of an error of law and there is nothing in the SVGA which provides a basis for departing from that general principle (***CD v DBS*** [2020] UKUT 219 (AAC)).

27. DBS is not a court of law. Reasons need only be sufficient/adequate. DBS does not need to engage with every potential issue raised. There are limits, too, as to how far DBS needs to go in terms of any duty to "investigate" matters or to gather further information for itself, but it must carry out its role in a way that is procedurally fair.

**The hearing before the Upper Tribunal**

28. The hearing of the appeal took place at the Upper Tribunal in London on 18 June 2025. We were assisted by a Yoruba interpreter, Mr Anthony Labeodan.

29. EAO represented herself at the hearing. Having sworn to tell the truth, she gave mixed evidence and submissions, and made herself available to be cross-examined by Mr Ryan for the DBS.

30. EAO spoke about the pressure that staff were under, saying that during the Covid pandemic she was the main carer for four clients, and had received a commendation letter for the skill, experience and commitment she showed in her work.

31. The DBS made findings in relation to two different examples of 'relevant conduct'. One concerned a service user who she said "took comfort" from spitting at new staff members on a fairly frequent basis. She said that colleagues had told her that the way to manage this behaviour was to pretend to spit back at her. She emphasised that she did not actually spit at the service user, but merely pretended to, and that this succeeded in stopping the service user's unwanted behaviour.

32. EAO accepted that she had on three occasions used service users' Oyster cards to pay for her own travel, but she maintained that others had done this too, and she denied that she presented any risk to the vulnerable adults she worked with. EAO said that she understood the term "financial abuse" and confirmed that she had undertaken e-learning on safeguarding adults. When pressed by Ms Bainbridge as to whether using their Oyster cards on three occasions did not involve financial harm she said that she had not had time to get money and had not followed the correct procedures. Under cross-examination by Mr Ryan EAO accepted that she had previously accepted that she had been wrong to use service users' Oyster cards for her own personal travel, that the service users in question were vulnerable adults, and that the use of the Oyster cards amounted to financial abuse.

33. However, EAO said that the Barring Decision was disproportionate. She said that she had tried to find further work since being placed on the Adults' Barred List. She said that while she had got a job involving children about the end of last year, that had come to an end and since then she had only been able to get work as a door supervisor, which was not what she wanted to do. She wanted to return to working in care, which she had done ever since she arrived in the UK.

34. EAO asked the Tribunal for compassion. She said that the Barring Decision effectively restricts her from earning a living for 10 years and means that she cannot support her aged parents abroad.

35. Mr Ryan, for the DBS, said that the scope of EAO's appeal (given the terms of the grant of permission) was narrow. He enjoined the Tribunal to give appropriate weight to the DBS's explanation of the rationale behind the Barring Decision as set out in its 'Barring Decision Making Process' document, which includes the 'financial abuse tool' assessment template.

## Discussion

36. There is no dispute that EAO has engaged in regulated activity.

37. DBS found, and EAO accepted, that EAO had, on at least three occasions between 2020 and 2022, used vulnerable adult service users' Oyster cards for her own travel. It also found, and EAO accepted, that she had pretended to spit at a service user with the intent of stopping the service user from spitting at her.

38. While at the permission hearing EAO accepted that her use of service users' Oyster cards to pay for EAO's own travel amounted to financial abuse, she was more circumspect at the substantive hearing. We have no hesitation in confirming that the DBS was entitled to find that EAO's actions did amount to financial abuse.

39. DBS was also entitled to find that EAO pretending to spit at a service user (while not actually spitting at the service user) risked emotional abuse.

40. Our task was to decide whether the Barring Decision was proportionate in all the circumstances. We accept that the Barring Decision has had grave consequences for EAO. It has stopped her from working in her chosen field of care, which she appears to have carried out for some years without complaints being made about her work. She has had to resort to working as a door supervisor, which has resulted in a drop in her income and has also resulted in her skills and experience in the care sector being put to waste.

41. While the financial value of the journeys which EAO paid for using service users' Oyster cards is presumed to be low, it still amounts to financial abuse which is a serious matter not only due to it depriving the service users financially, but in undermining their trust in their carers, something that EAO acknowledged in her reflective statement.

42. We were concerned that while EAO largely accepted responsibility for her actions at the permission hearing, by the time of the substantive hearing she sought to minimise her wrongdoing, and to deny that it amounted to financial abuse. This concerned us, because it indicated that EAO did not have the degree of insight that she appeared to have at the permission hearing. Such a lack of insight is important because if EAO does not accept that her actions were wrong there is a higher likelihood that she might repeat the same or similar abuse in the future.

43. With regard to the incident of EAO pretending to spit at a service user, we consider that had this been the only abuse found, barring EAO would not have been a proportionate, but the Barring Decision was made based on both the pretended spitting and the financial abuse.

44. In all the circumstances, while we can see why EAO considers the sanction of barring to be harsh and we have sympathy for her situation, we find that the Barring Decision was nonetheless a proportionate response.

## Conclusion

45. We therefore conclude that the decision of the DBS was not based on any material mistake of fact or law. We dismiss the appeal. The Barring Decision is confirmed.

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

**Tribunal Member Bainbridge**
**Tribunal Member Graham**

Authorised by the Judge for issue on 8 September 2025