



Neutral Citation Number: [2025] UKUT 304 (AAC)
Appeal No. UA-2024-001791-V

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

NAC

Appellant

v

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Jacobs

Tribunal Members Smith and Turner

Decided on following an oral hearing on 03 September 2025.

Representation:

Appellant: Philip Dayle of counsel, instructed by Aman Solicitors Advocates

Respondent: Bronia Hartley of counsel, instructed by DLA Piper UK LLP

On appeal from the Disclosure and Barring Service (DBS from now on):

DBS reference: 01029375822

Decision letter: 9 September 2024

THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:

No one shall publish or reveal the name or address of any of the following:

- (a) NAC, who is the Appellant in these proceedings;**
- (b) any of the service users or members of staff mentioned in the documents or during the hearing;**

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 sanctions 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.

SUMMARY OF DECISION

Safeguarding Vulnerable Groups (65.8 – Proportionality)

Safeguarding Vulnerable Groups Act 2006 - section 4(2)(a) – limited case put to Upper Tribunal – Upper Tribunal considered for itself whether decision was proportionate and decided that it was.

Safeguarding Vulnerable Groups (65.9 – Finding of fact)

Safeguarding Vulnerable Groups Act 2006 - section 4(2)(b) – Upper Tribunal heard evidence from appellant and made its own assessment of the evidence as a whole – no mistake found.

DECISION OF THE UPPER TRIBUNAL

This decision is given under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA from now on):

DBS did not make mistakes in law or in the findings of fact on which its decision was based. DBS's decision is confirmed.

REASONS FOR DECISION

A. Introduction

1. On 9 September 2024, DBS included NAC in the adults' barred list on the following finding of relevant conduct:

On 20/12/2023, whilst employed as a Care Assistant at BG, you hit resident IR on the back of her head and on her hand.

2. Upper Tribunal Judge Jacobs gave permission to appeal on the grounds presented. In summary, the grounds were that DBS made mistakes in its finding of fact and that its decision was disproportionate. NAC did not apply for permission to amend his grounds (as explained in Section III of *KS v Disclosure and Barring Service* [2025] UKUT 45 (AAC)). Accordingly, we limited our consideration to the grounds on which permission was given, as required by *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982 at [97].

B. The oral hearing

3. Judge Jacobs directed that the appeal be considered at an oral hearing. The hearing took place on 3 September 2025. We are grateful to both counsel for their questioning of NAC and their submissions on the appeal. We also thank NAC for his evidence.

C. The legislation

The barring provisions

4. DBS made its decision under paragraphs 9 and 10 of Schedule 3 SVGA.

*Behaviour***Paragraph 9**

- (1) This paragraph applies to a person if—
 - (a) it appears to DBS that the person—
 - (i) has (at any time) engaged in relevant conduct, and
 - (ii) is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and
 - (b) DBS proposes to include him in the adults' barred list.
- (2) DBS must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.
- (3) DBS must include the person in the adults' barred list if—
 - (a) it is satisfied that the person has engaged in relevant conduct,
 - (aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and
 - (b) it is satisfied that it is appropriate to include the person in the list.

Paragraph 10

- (1) For the purposes of paragraph 9 relevant conduct is—
 - (a) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;
 - (b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;
 - (c) conduct involving sexual material relating to children (including possession of such material);
 - (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
 - (e) conduct of a sexual nature involving a vulnerable adult, if it appears to DBS that the conduct is inappropriate.
- (2) A person's conduct endangers a vulnerable adult if he—
 - (a) harms a vulnerable adult,
 - (b) causes a vulnerable adult to be harmed,
 - (c) puts a vulnerable adult at risk of harm,
 - (d) attempts to harm a vulnerable adult, or
 - (e) incites another to harm a vulnerable adult.
- (3) 'Sexual material relating to children' means—
 - (a) indecent images of children, or
 - (b) material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification.

(4) 'Image' means an image produced by any means, whether of a real or imaginary subject.

(5) A person does not engage in relevant conduct merely by committing an offence prescribed for the purposes of this sub-paragraph.

(6) For the purposes of sub-paragraph (1)(d) and (e), DBS must have regard to guidance issued by the Secretary of State as to conduct which is inappropriate.

The appeal provisions

5. Section 4 SVGA contains the Upper Tribunal's jurisdiction and powers.

4 Appeals

(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—

...

(b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;

(c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.

(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—

(a) on any point of law;

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

(3) For the purposes of subsection (2), 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.

(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.

(5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS.

(6) If the Upper Tribunal finds that DBS has made such a mistake it must—

(a) direct DBS to remove the person from the list, or

(b) remit the matter to DBS for a new decision.

(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)—

- (a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and
- (b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.

...

D. Our approach to the case

6. We heard evidence from NAC as we are entitled to do: *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982 at [95]. That evidence was contained in his witness statement dated 12 August 2025. He supplemented this in response to questions from Mr Dayle, on cross-examination by Ms Hartley, and in answer to questions from the panel.

7. Having heard that evidence, we approached the case in accordance with the decision of the Court of Appeal in *RI v Disclosure and Barring Service* [2024] 1 WLR 4033. Bean LJ there approved at [29] the submission by counsel for RI at [28] that ‘the Upper Tribunal is entitled to hear oral evidence from an appellant and to assess it against the documentary evidence on which the DBS based its decision.’ Later at [31], Bean LJ said that ‘where relevant oral evidence is adduced before the UT ... the Tribunal may view the oral and written evidence as a whole and make its own findings of primary fact.’ And Males LJ said at [50] that the Upper Tribunal is ‘entitled to evaluate that evidence, together with all the other evidence in the case ...’ We note that Bean LJ said at [31]:

... whether or not A stole money from B cannot be considered a matter of ‘specialist judgment relating to the risk to the public’ engaging the DBS’s expertise.

The same can be said of whether NAC hit IR.

8. In deciding whether DBS made a mistake of fact or law, we had to consider the circumstances as they were at the date of DBS’s decision, which was 9 September 2024. See *SD v Disclosure v Barring Service* [2024] UKUT 249 (AAC). We are entitled to take account of evidence that was not before DBS, provided that it can be related back to that date.

E. Mistake of fact

The evidence

9. The incident took place on 20 December 2023. There is no audio evidence or CCTV of what happened. IR has dementia and could not give reliable evidence of what took place. The only evidence is that of NAC and his co-worker KD.

10. NAC and KD were preparing IR for the night. They wheeled her into her bedroom, changed her clothes and pad, and settled her in the bed. IR has dementia and is not an easy person to deal with. Hence the need for two carers. KD described her behaviour that evening as ‘very aggressive, and she was scratching, hitting, pulling, saying unpleasantly’. This, she said, ‘was normal behaviour for her’.

11. When IR was settled into her bed, KD reported to NE, who was in charge that night, that NAC had hit IR. This was further reported to the duty manager by telephone. NAC was told to collect his belongings and go home.

12. In the early hours of the next morning (21 December), NE made a note of what happened. She wrote that KD 'told me that staff member (NAC) had hit IR hard twice! On the head and on the hand.'

13. KD wrote a short report on 21 December;

When IR scratched member of staff called NAC he hit her hard on the back of her head. I said to him 'What you are doing to a vulnerable person?' His replies was 'She scratched me, what you expect me to do?' Another time IR hit NAC and he hit her strong on her hand.

She was interviewed on 22 December. Her answers were consistent with her original account, but she added some relevant information. When asked how IR had reacted to being hit, she said:

For a moment she just went quiet and looked shocked, then became aggressive again.

When asked about NAC, she said:

I have noted NAC is quite aggressive at times. This is normal for him.

And later:

We have worked together several times. He can be aggressive towards residents, not gentle and kind, but never before has he crossed the line.

Finally, she said:

I think you need to speak to other staff as S has reported to me that she has witnessed him [NAC] being aggressive.

14. NAC was interviewed on 21 December. We have considered the whole of the record, which he signed. These are the parts we find particularly relevant:

CH - please tell me what happened on shift last night.

NAC - Shift went well, until 12pm, most residents in bed, only 3-4 left.

CH - was IR one of these residents left. YES. What happened when you put IR to bed?

NAC - She was sitting, sleeping over there for 3-4 hrs, about 11:30pm, it is normal for us she is shouting so me and KD transferred her to the bedroom, as I was transferring her she scratched my hand and tried to bite me, when I take my hand out I caught her, and then I tapped her on her head to tell her to calm down and said Daddy is sleeping as she normally calls for Daddy. I showed her the window to show her it was dark. KD said don't hit residents, I said I'm not hitting residents, I am calming her down, relaxing her. KD didn't say anything to me at the time.

CH - we have a statement from KD that says when IR scratched your hand you hit her hard on the back of her head, then she said to you what are you doing, she is a vulnerable person, and you said she scratched me what are you expecting me to do.

NAC - I didn't hit her I just took my hand back.

CH - she also said you hit her on the back of her hand.

NAC - Not hitting I just took my hand away, not snatching, I just saved my hand. She tried to bite me a few times. I did not hit her strong, I just took my hand firmly away.

CH - so she got hold of your hand and it was by her face so when you move her hand it could have hit her.

NAC - Yes because I was saving my hand, as soon as she bit me I took my hand away.

CH - did your hand touch her head.

NAC – No, then after I tell her it's night time, daddy is sleeping, you need to sleep as well, so I tapped her head to calm her down.

CH - did KD say to you don't hit the residents.

NAC – Yes, I just said I was trying to save my hand, it's not hitting it's not like I was slapping. I have 2 babies myself, I'm not hitting I've never hit anyone in my life.

15. NAC dealt with the incident in his witness statement:

2. I had been working at the ... care home for the last 2 to 3 months and I worked as a healthcare assistant. I recall an incident that took place in December 2023 whilst I was on my usual shift routine. Part of my role is to assist residents by putting them into bed and I also help with their personal care activities. My role includes working as a team with the other staff members. One of our residents, namely IR required assistance getting into bed to go to sleep. Another carer namely KD called me to assist in taking IR to her room. Both KD and myself would need to help change her night dress in order to get ready for bed. KD was also a care assistant and I agreed to help her. I recall that we had to move IR from the sofa in the living room to a wheelchair and then assist her by moving her from her wheelchair to the bed. Whilst I was transferring IR, she tried to bite me twice on my hand and I simply tried to save myself so that she would not bite me again. IR was known to show this kind of behaviour previously and we were aware that she would often scratch or bite.

3. Further, whilst moving her into her bed, I record that she scratched me on my hand and again tried to bite me on my hand. I was aware that she would try to behave like this and I tolerated it as much as I could and continued with my job. IR was hurting my hand biting it and the pain became unbearable so I pulled my hand out of her mouth quickly. This action hurt IR a little bit and KD asked me what I was doing? I replied to her, 'What do you expect me to do?' meaning that I had to pull my hand out as the pain became unbearable. I feel this caused a misunderstanding for KD. IR had a history of showing aggression to carers. I tried to stop IR from behaving in such a way, I tried to get her attention by tapping her on the forehead. I asked her to look outside the window. I asked her to look that it was night time and that it was time for her to sleep. I recall at the time she was shouting saying 'daddy daddy' loudly. I told her that daddy is sleeping as it was dark outside and she should also sleep and I told her that daddy will come to see her soon.

4. Eventually, she calmed down and laid herself down into bed. After this, KD and myself changed her pad and her clothes. I recall during this period she did not shout or scream and happily went to bed. We completed our task and tidied

the area and left her in bed. I recall as I closed the door, I saw IR move and she was smiling. I then went to the living room to perform my other tasks. I recall that our shift leader was off that night and KD was covering our leader's shift. As the other residents were also in bed, KD agreed that we should start taking our breaks now one by one. KD stated that she would go first and then the others would follow one by one and we all agreed to this. Approximately 10 minutes later, another shift leader by the name of NE came to me looking for KD. I mentioned to NE that KD is on a break and she is in the common staff room. NE went to her and then after two minutes, I was called into the common room.

16. In his oral evidence, NAC emphasised repeatedly that he had tapped IR on the side of her head, but had never hit or slapped her on the back of her head or on her hand. He was questioned by the panel about the position of himself, KD and IR relative to each other when the incident occurred. He described IR lying on the bed on her back. He also emphasised that she was biting his hand at the time.

17. It was put to NAC several times that even tapping IR was disrespectful. He did not accept that and repeated that she was biting him.

18. Finally, NAC said that KD's evidence was influenced by professional jealousy. He had completed training packages in order to further his career. As a result, he had been awarded Tesco vouchers. KD, in contrast, had said she was not going to bother with the packages until she wished to progress. She had been told, shortly before the incident, that she would not receive vouchers. To give this evidence our fullest consideration, we took it to cover KD deliberately or subconsciously acting on her jealousy to invent or exaggerate what she had seen in order to cause trouble for NAC.

Our analysis

19. We have assessed the evidence as a whole. This is a basic requirement, which was reinforced by the reasoning in *RI*.

20. We find that KD's only motive for reporting as she did was to draw NAC's actions to the attention of management. There is no evidence to support any improper motive, deliberate or subconscious. By NAC's own account, KD was not bothered about progressing her career at that time and had to accept the consequences. Given KD's attitude to her career, as reported by NAC, there was no reason for her to be jealous.

21. As Ms Hartley pointed out, KD had given a balanced account, acknowledging how difficult IR was to manage and that this was the first time she had seen NAC step over the line in his rough handling. That was not consistent with someone who was prejudiced against him. We also note that KD invited the investigator to ask another carer about NAC, something that would be a risk if that carer did not support her.

22. KD's actions are consistent with her concern at the way NAC had treated IR. She questioned what NAC was doing, as he admits. She gave a credible account of IR's reaction. And, as Ms Hartley pointed out, she reprimanded NAC for his handling of IR. We can be sure of that. Not only because KD said so, but because NAC confirmed this twice during the investigation. When IR was settled, KD promptly reported what had happened, wrote a note and attended an interview. Her account was consistent throughout.

23. We find that NAC's account at the hearing was not reliable. In particular, we find that IR was not lying on her back and that KD was in a position to see what NAC did with his hands. This was the first time that he had given this account. If IR were on her

back, it would be nigh on impossible for him to hit IR on the back of her head. If that were true, he would surely have made the point right from the beginning. He did not do so during the investigation or in his witness statement.

24. Moreover, NAC was inconsistent when answering the questions from the tribunal. He initially told the judge that IR had been changed and was in her night clothes and lying on the bed. This seemed to change as he expanded on his answers. In his answers to Ms Smith, he was clear that IR had not been changed into her night clothes at the time.

25. NAC's oral evidence also placed greater emphasis on IR biting his hand to the point that he could not withdraw it than during the investigation and in his witness statement. If this was what happened, he would surely have made more of it in the investigation than he did.

26. So, in conclusion, we find KD's evidence reliable in contrast to NAC's. DBS's finding was based on KD's account and we find no mistake in it.

F. Mistake of law – proportionality

27. The only argument for NAC on proportionality was one paragraph in the grounds of appeal:

It is submitted by inclusion in the Adults Barred List, the Appellants Article 8 rights would be considerably impacted. The effect of the final decision by the DBS would mean the Appellant cannot take up employment in a field that he has been training for a number of years, such a decision is likely to impact his private family life as well as impact his earnings potential considerably and is likely to have a strain on his mental well-being.

28. Mr Dayle did not address us on the issue at the hearing. As permission has been given on the issue, we must decide for ourselves whether DBS's decision was proportionate. We do so in accordance with the decision of the Upper Tribunal in *KS v Disclosure and Barring Service* [2025] UKUT 45 (AAC), applying the four criteria set out in Section V of that decision.

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

29. 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 vulnerable adults from harm by those entrusted with their care in regulated activity. That objective is sufficiently important to justify interfering with NAC's exercise of his Article 8 Convention right.

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

30. DBS's decision under the barring scheme prohibits NAC from engaging in regulated activity. That is rationally connected to the objective of the scheme.

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

31. We are not aware of any other measure that would protect vulnerable adults but would be less intrusive than including NAC in the list. None was suggested in the

grounds of appeal. The argument there was directed to the fourth criterion, which we now come to.

(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

32. We accept that NAC's Article 8 rights will be affected in the ways set out in the ground of appeal. The ground does not, though, address the balance that has to be struck under this criterion. There are other career options that NAC can pursue outside regulated activity. His earning capacity may be reduced, but not necessarily so. It is possible to live a comfortable life in the many fields that will be open to him. And, more importantly, the protection of vulnerable adults outweighs any reduction in his standard of living. As to his mental well-being, there is no evidence before us on this.

33. For those reasons, we find that DBS's decision was proportionate.

Edward Jacobs
Upper Tribunal Judge

Rachael Smith
Matthew Turner
Members

Authorised for issue on 08 September 2025