



Neutral Citation Number: [2025] UKUT 345 (AAC)  
Appeal No. UA-2022-000440-V

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**MM**

**Appellant**

**- v -**

**THE DISCLOSURE AND BARRING SERVICE**

**Respondent**

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

**No one shall publish or reveal:**

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

- a. the Appellant in these proceedings, who is referred to by the cipher MM**
- b. the complainants in respect of the assaults referred to in these proceedings**

**or any information that would be likely to lead to the identification of any of them or any member of their families in connection with these proceedings.**

**Any breach of this Order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanction under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.**

**Before:** Upper Tribunal Judge Church  
Tribunal Member Graham  
Tribunal Member Jacoby  
**Hearing date:** 24 April 2025  
**Mode of hearing:** Face to face at Field House, London

**Representation:**

**Appellant:** Self-represented

**Respondent:** Rosalind Earis of counsel, instructed by DLA Piper LLP

**On appeal from:** The Disclosure and Barring Service  
**Case No:** PTW88494(Primary) – CAS-225974-JBT7SV  
**Decision Date:** 30 November 2021

## **SUMMARY OF DECISION**

### **SAFEGUARDING VULNERABLE GROUPS (65)**

This appeal is mainly about whether the DBS was mistaken to find that MM committed two violent sexual offences (of which he was acquitted in criminal proceedings).

It also considers whether the DBS's findings that MM poses an ongoing risk to vulnerable adults or children were made in error of law or fact, and whether the DBS's decision to bar MM involved material mistakes of law in:

- a) failing to follow its own 'Making Findings' guidance;
- b) failing to take into account MM's regulator's decision to close its disciplinary proceedings against MM at the screening stage;
- c) making an unevidenced decision that MM was likely to repeat the misconduct which was the subject of the Caution offence; and
- d) making a decision that was, in all the circumstances, disproportionate.

The Upper Tribunal dismissed the appeal on all grounds and confirmed the DBS's decision.

*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.**

## **REASONS FOR DECISION**

### **Introduction: what this appeal is about**

1. This appeal is mainly about whether the DBS was mistaken to find that MM committed violent sexual offences (of which he was acquitted in criminal proceedings) against his then wife.
2. It also considers whether:
  - a. the DBS erred in law or in fact in finding MM to pose an ongoing risk to vulnerable adults and children;
  - b. the DBS erred in law by failing to consider its own guidance about making findings where allegations have been the subject of criminal proceedings and the person has not been convicted;
  - c. the DBS erred in law by failing to take into account MM's regulator's decision to close its disciplinary proceedings against MM at the screening stage;

- d. the DBS erred in law by making an unevidenced decision that MM was likely to repeat the misconduct which was the subject of the Caution offence; and
- e. the DBS erred in law by making a decision that was, in all the circumstances, disproportionate.

### **Factual background**

- 3. MM qualified as a paediatric nurse in 2002 and as a mental health nurse in 2006. Until he was dismissed from his job in April 2020, MM worked as a mental health nurse in the crisis team of an NHS Foundation Trust.
- 4. In October 2014 he accepted a police caution for the offence of “assault/ill-treat/neglect/abandon a child/young person to cause unnecessary suffering/injury contrary to section 1(1) of the Children and Young Persons Act 1933 (the “**Caution**”). The circumstances of the offence were that MM assaulted his teenage step-daughter, slapping her multiple times during a verbal argument, causing her to hit her head against a wall, resulting in bruising in the vicinity of her eye and jaw (see page 224 of the Upper Tribunal appeal bundle).
- 5. The Caution meets the criteria for ‘automatic inclusion with representations’ on both the children’s and adults’ barred lists under paragraphs 2 and 8, respectively, of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (the “**2006 Act**”).
- 6. MM was referred to the DBS, who wrote to him in January 2015 to inform him that it intended to include him in the barred lists and to give him the opportunity to make representations against his barring.
- 7. Having received no representations in response to that letter the DBS wrote to MM again on 22 April 2015, this time to inform him that it had decided to include his name on both barred lists.
- 8. The DBS accepts that the Appellant didn’t receive either the initial letter inviting him to make representations or the letter informing him that his name had been included on the lists because it accepts that he was no longer living at the address to which the DBS sent those letters.
- 9. The DBS came to learn of MM’s new address when he made an application for enhanced disclosure in connection with an application for a promotion to a senior manager position with his employer. The DBS wrote to him at that address on 7 February 2018, but that letter was returned to it marked “not called for”. However, MM made contact with the DBS by email on 17 March 2020 and provided a new address.
- 10. The DBS wrote to MM at the new address he had provided to inform him of the earlier barring decision and to tell him that it would be willing to accept late representations against its decision to bar him.
- 11. On 9 July 2020 MM’s then representative, The Royal College of Nursing, sent representations against MM’s barring to the DBS. These representations:
  - a. acknowledged the existence of the Caution;
  - b. stated that MM had expressed remorse for the Caution offence;

- c. described the Caution offence as an isolated incident, saying that there had been no repeat in the years since the offence, and there was no risk of repetition;
  - d. highlighted that the Caution offence occurred in a domestic, rather than professional, setting;
  - e. said there was no lasting harm to the victim; and
  - f. said the Caution offence was at the less serious end of the scale, as was indicated by its disposal by way of police caution.
12. The representations argued that to bar MM based on the Caution offence was disproportionate, and to place his name on the adults' barred list was wrong in law given that the Caution offence was committed against a child, not an adult.
13. The representations were accompanied by a statement of reflection written by MM and character references in his support from the course leader on his university Masters' programme, a colleague, MM's niece, and a psychotherapist who had provided counselling to MM and his wife from 2014 for three years. The DBS considered those representations and reviewed further evidence.
14. On 21 July 2021 the DBS wrote to MM again to inform him that it had made further findings on the balance of probabilities in relation to two further allegations. Those allegations were that he had attempted to rape his then wife (to whom we shall refer as the "**complainant**") anally in September 2013 and had raped the complainant anally on 28 December 2013 (the "**2013 Allegations**").
15. The DBS acknowledged that MM had denied the 2013 Allegations and had been acquitted by a jury of all charges in relation to them following a Crown Court trial. However, it explained that while the criminal courts operated to the criminal standard of being "sure", the DBS was required to make its findings to the civil standard of the "balance of probabilities", and that it had found them proved to that standard.
16. The DBS invited MM to make further representations in relation to its findings in relation to the 2013 Allegations and whether his name should remain on the barred lists.
17. On 14 September 2021, The Royal College of Nursing made further representations on MM's behalf, in which the 2013 Allegations were robustly denied. It was asserted that the complainant in respect of the 2013 Allegations had been insecure, jealous and upset by MM flirting with other women and had made the allegations maliciously.
18. The representations asserted that MM and the complainant had engaged in consensual vaginal intercourse in their bedroom on the night they returned from a party and MM had also consensually inserted his finger into the complainant's anus. MM accepted that there was one occasion on which he had put his penis in the complainant's anus, but when she told him it was painful he had stopped.
19. MM denied any instance of unconsented sexual activity. He also denied ever having *admitted to* engaging in any unconsented sexual activity. Messages of apology MM had sent to the complainant (relied upon by the DBS as evidence supporting the truth of the 2013 Allegations) related not to the 2013 Allegations,

but rather to his having been verbally abusive to the complainant when they had argued.

20. The representations noted that the complainant “knew all of [MM’s] passwords for his email accounts and phone accounts.”
21. It was stated that MM had advised the complainant to visit the GP in December 2013 as she had mentioned some bleeding/spotting. It was said that this was not the first time that the complainant had experienced bleeding while they attempted consensual anal sex, and she had often complained that MM had a large penis. The representations asserted that MM and the complainant had, as a couple, purchased a collection of anal toys, and the complainant had anal creams or medication for treating anal fissures or tears.
22. It was suggested that the complainant had made the 2013 Allegations against MM maliciously because MM had flirted with other women, causing the complainant to feel jealousy.
23. Another suggested motivation for the complainant making the 2013 Allegations was a wish to undermine Family Court proceedings that had been prompted by MM having raised concerns about the complainant’s parenting. It was suggested that the 2013 Allegations were a tactical ploy to allow the complainant to ‘keep the children’. It was alleged that the complainant had sought to manipulate various people to support her allegations and her agenda, including the counsellor with whom MM and the complainant had had joint sessions.
24. By a letter dated 30 November 2021 (the “**Final Decision Letter**”), the DBS explained to MM that it had considered his further representations and had decided on the basis of both the Caution and its findings in relation to the 2013 Allegations that he had engaged in relevant conduct in relation to both children and vulnerable adults, and it was appropriate and proportionate that his name should continue to be on both barred lists (the “**Barring Decision**”).

## Legal Framework

### The statutory scheme

25. There are multiple gateways under Schedule 3 to 2006 Act to a person’s name being included on a barred list. While the initial decision to place MM’s name on the Adults’ and Children’s Barred Lists made on 22 April 2015 was made under paragraphs 2 and 8 of Schedule 3 of the 2006 Act (known as the ‘autobar with reps’ gateway), the Final Decision (which is the subject of this appeal) relied instead on the “relevant conduct” gateway, which is explained further below.

### *The ‘relevant conduct’ gateway*

26. The provisions in relation to the “relevant conduct” gateway under the 2006 Act required the DBS to be ‘satisfied’ of three things:
  - a. that MM was at the relevant time, had in the past been, or might in future be “engaged” in, “regulated activity” in relation to children and/or vulnerable adults (see paragraphs 3(3)(aa) (in relation to children) and 9(3)(aa)(in relation to vulnerable adults) of Schedule 3 to the 2006 Act);
  - b. that MM had “engaged” in (see paragraphs 3(3)(a) (in relation to children) and 9(3)(a) (in relation to vulnerable adults) of Schedule 3 to the 2006

- Act) “relevant conduct” (defined in paragraph 4 (in relation to children) and paragraph 10 (in relation to vulnerable adults); and
- c. that it was “appropriate” (and proportionate) to include MM on the barred list(s) (see paragraph 3(3)(b) (in relation to children) and 9(30)(b) (in relation to vulnerable adults) of Schedule 3 to the 2006 Act).
27. If the DBS was satisfied of all three matters above, it was required to place MM’s name on both barred lists.
28. MM does not dispute that the “regulated activity” requirement is met in this case by reason of his work as a nurse, so item a. in paragraph [26] above is not in issue.
29. Since MM accepted a police caution for the offence of “assault/ill-treat/neglect/abandon a child/young person to cause unnecessary suffering/injury contrary to section 1(1) of the Children and Young Persons Act 1933”, he must accept that he has engaged in “relevant conduct” in relation to children. However, he disputes that it was appropriate or proportionate to include his name on any barred list based solely on his commission of the Caution offence.
30. The position in relation to the 2013 Allegations is the converse of this: he accepts that the conduct that the DBS found him to have engaged in would make barring both appropriate and proportionate, but his case is that each of the 2013 Allegations was false, and there was therefore no proper basis for his name being placed on any barred list.

#### The Upper Tribunal’s jurisdiction under the 2006 Act

31. Section 4 of the 2006 Act sets out the circumstances in which an individual may appeal against the inclusion of their name in the barred lists or either of them. An appeal may be made only on grounds that the DBS has made a mistake on any point of law or in any finding of fact which it has made and on which the barring decision was made (see section 4(1) and (2) of the 2006 Act).
32. An appeal under section 4 of the 2006 Act may only be made with the permission of the Upper Tribunal (see section 4(4) of the 2006 Act).
33. Unless the Upper Tribunal finds that the DBS has made a mistake of law or fact it *must* confirm the decision of the DBS (see section 4(5) of the 2006 Act). If the Upper Tribunal finds that the DBS has made such a mistake it must either direct the DBS to remove the person from the list or remit the matter to DBS for a new decision.
34. 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.
35. Section 4(3) of the 2006 Act provides that, for the purposes of section 4(2) of the 2006 Act, whether or not it is “appropriate” for an individual to be included in a barred list is “not a question of law or fact”.

The relevant authorities

36. An appeal under section 4 of the 2006 Act is not a full merits appeal permitting the Upper Tribunal to substitute its own judgment on the question of appropriateness. An appeal can succeed only if the appellant can demonstrate an error in a material finding of fact or in the approach taken by the DBS as a matter of law.
37. In relation to whether it is “appropriate” to include a person in a barred list, the tribunal has only limited powers to intervene. This is clear from section 4(3) of the 2006 Act and relevant case law. In particular, the judgment as to appropriateness (described by Wyn Williams J in **R (RCN) v SSHD & ISA** [2010] EWHC 2761 (Admin) as “*the ultimate question*”) may only be challenged on the grounds that it is irrational, disproportionate or otherwise unlawful (see §104 and see also **DBS v AB** [2021] EWCA Civ 1575 (“**AB**”). The DBS is well-equipped to make safeguarding decisions of this kind (see **AB** at §§43-44, 55 and 66-75)).
38. When it comes to mistakes of fact, the “starting point” for the tribunal’s consideration will be the DBS decision: **PF v DBS** [2020] UKUT 256 (“**PF**”), §51(g). Notwithstanding that, the tribunal will not defer to the DBS on factual matters, but the amount of weight given to the DBS’s findings of fact will depend on all the circumstances: **PF** at §§49 and 51(f). The evaluation of evidence is not a mistake of fact and therefore, if an appellant does not produce evidence on appeal which was not available to the DBS, then the tribunal may only find that there has been a mistake of fact if it concludes that there is no evidence to support that finding of fact or that it was irrational: **DBS v JHB** [2023] EWCA Civ 982 (“**JHB**”) at §§93-95.
39. If the tribunal hears evidence which was not before the DBS, it may be entitled to reach the view that, having heard that evidence, a factual finding of the DBS was wrong: **JHB**, §95; **DBS v RI** [2024] EWHC Civ 95 (“**RI**”), §§28-29. Any mistake of fact must be material in the sense of making a material contribution to the overall decision, to warrant the setting aside of a barring decision: **PF**, §51(b).
40. Where it is submitted that a decision to include a person on the Adults’ Barred List or Children’s Barred List amounts to a disproportionate interference with that person’s rights under the European Convention on Human Rights (“**ECHR**”), the tribunal must accord “appropriate” weight to the conclusions reached by the DBS on this matter, noting its particular expertise in these matters: **B v ISA** [2013] 1 WLR 308. If the tribunal finds that the DBS has exercised its power rationally and in accordance with the purpose of the 2006 Act, “*it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights*”: **Belfast City Council v Miss Behavin’ Ltd** [2007] 1 WLR 1420.
41. The appeal is against the decision made by the DBS, not simply the contents of the decision letter: see **XY v ISA** [2011] UKUT 289 (AAC) (“**XY v ISA**”) at §40. The DBS’s decision must “*be read fairly and as a whole*”: **AB**, §46.
42. At §55 of **AB**, the Court cautioned: “*[The Upper Tribunal] will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter...*”. At §[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”.*

43. In the subsequent Upper Tribunal case, **AB v DBS** [2022] UKUT 134 (AAC), the Upper Tribunal decided (albeit in the context of a case that was based on the “risk of harm” rather than the “relevant conduct” gateway) that **AB** meant that the Upper Tribunal could consider, on appeal under the 2006 Act, a finding of fact by DBS that an individual poses “a risk” of harm but not a DBS assessment of the “level of the risk posed” (see §§49-52 and 64).
44. When considering appeals of this nature, the tribunal “must focus on the substance, not the form, and the appeal is against the decision as a whole and not the decision letter, let alone one paragraph...taken in isolation”: **XY v ISA** at §40).
45. When considering a barring decision, the 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).
46. The statement of law in **R (Iran) v Secretary of State for the Home Department** [2005] EWCA Civ 982 indicates that materiality and procedural fairness are essential features of an error of law and there is nothing in the 2006 Act which provides a basis for departing from that general principle (see **CD v DBS** [2020] UKUT 219 (AAC)).
47. The DBS is not a court of law. Reasons need only be sufficient/adequate. The DBS does not need to engage with every potential issue raised. There are limits, too, as to how far the DBS needs to go in terms of any duty to “investigate” matters or to gather further information for itself, but it must carry out its role in a way that is procedurally fair.
48. If the Upper Tribunal finds that the DBS made a material mistake of fact or law under section 4(2) of the 2006 Act, it is required under section 4(6) either (i) to direct that DBS removes the person from the relevant list(s) or (ii) to remit the matter to DBS for a new decision. Following **AB**, the usual order will be remission back to DBS unless no decision other than removal is possible on the facts.

### The Barring Decision

49. Having considered the representations made on MM’s behalf by his representative, the DBS confirmed the provisional findings it had set out in its 21 July 2021 letter and its decision that his name should remain on both barred lists. It explained that:

#### *Re Caution offence*

- a. it accepted that the facts and circumstances of the Caution offence were as MM said they were, but it was concerned that MM had reacted in a violent way to a child exhibiting challenging behaviour despite his training and experience. It was concerned that should MM experience

challenging behaviour in a regulated setting in the future there was a risk that MM might again lose control and respond with violence;

*Re 2013 Allegations*

- b. it found the complainant's accounts of being subjected to violent sexual assaults by MM:
  - i. to be consistent;
  - ii. to be corroborated by near-contemporaneous reports to professionals as well as friends and family members;
  - iii. to have significantly pre-dated the Family Court proceedings;
  - iv. to have been put to MM by the complainant in the course of a joint counselling session and in messages exchanged between the complainant and MM, and were not denied by MM; and
  - v. to be supported by emails referring to "sexual trauma" that were (despite his denials) written by MM.
50. The DBS preferred the complainant's evidence over MM's. It did not accept MM's explanation that his email messages acknowledging wrongdoing and expressing remorse referred only to his having said hurtful things during arguments. It decided that, when read in context, the messages clearly referred to MM having subjected the complainant to violent sexual assaults as she had alleged.
51. Based on its factual findings the DBS assessed that MM had feelings of entitlement to sex and an inability to manage his urges, and that these concerns were transferable to regulated activity both with vulnerable adults and with post-pubescent children.
52. The DBS decided, based on MM's denial of the 2013 Allegations at the Crown Court trial and in his representations to the DBS, that MM was not remorseful.
53. The DBS concluded that MM's inclusion in both barred lists was appropriate and proportionate.

**Grounds of appeal**

54. MM applied to the Upper Tribunal for permission to appeal and the matter came before me. His appeal grounds can be summarised as:
  - a. the Respondent made a material mistake of fact in deciding the 2013 Allegations (of which he was acquitted following a Crown Court trial) were made out to the civil standard ("**Ground 1**");
  - b. the Respondent made a material mistake of fact and/or law in finding that MM poses an ongoing risk to vulnerable adults and/or children ("**Ground 2**");
  - c. the Respondent made a material mistake of law in failing to consider its own guidance by failing to obtain further evidence in the criminal proceedings, including the court transcript, and in making its findings without being in possession of all the material before the jury in the Crown Court trial ("**Ground 3**");

- d. the Respondent made a material mistake of law in failing to take into account the Nursing and Midwifery Council's decision to close the case against MM at the screening stage ("**Ground 4**");
  - e. the Respondent made a material mistake of law in making an unevidenced decision that MM was likely to repeat the misconduct which was the subject of the Caution offence ("**Ground 5**"); and
  - f. the Barring Decision was, in all the circumstances, disproportionate ("**Ground 6**").
55. On the basis that MM vehemently denied the 2013 Allegations and indicated that he wanted to give evidence at an oral hearing, Upper Tribunal Judge Church decided that there was a realistic (as opposed to fanciful) prospect that he may succeed in persuading the Upper Tribunal that the DBS made a mistake of fact. The grant of permission extended to all six grounds. An oral hearing of the substantive appeal was directed.

### The oral hearing before the Upper Tribunal

56. The oral hearing of the substantive appeal took place on 24 April 2025 at Field House, London.
57. MM represented himself at the hearing, and the DBS was represented by Ms Earis. MM gave evidence and made himself available for cross-examination by Ms Earis on behalf of the DBS.
58. In his evidence MM denied categorically that he ever engaged in any unconsented sexual activity with the complainant. He said that he and his former wife had attempted anal sex on occasion, but this was always consensual.
59. Ms Earis directed MM and the tribunal to the transcript of MM's second police interview (conducted under caution and with a solicitor present) of 4 May 2018. According to the transcript, a police officer read out text messages said to have been sent by MM to the complainant, including one stating:
- "I know I've done stupid things and have hurt you along the process and my et [sic] my behaviour and actions whether I was drunk or not I never meant to hurt you and I will forever be sorry Would it make you feel better and ease some of your pain to see me behind bars or suffer as a result? If it will, I will go hand myself in. I know it was not okay what I did, drink a bottle of Hennessy and I lost self-control. I am ashamed and will never forgive myself and I didn't expect to either. All your [sic] asking of me is tough to hand myself in...I'm already in hell so if you think I should be in jail please go ahead and call the police, I will own up to everything."* See page 298 of the Upper Tribunal appeal bundle.
60. Ms Earis put to MM that this message represented his acknowledgment that he had raped the complainant. Ms Earis said that the references to his handing himself in, to his potentially being "*behind bars*", and saying he will "*own up to everything*" should the complainant "*call the police*" were clearly references to his having engaged in criminal behaviour towards her, and it was not consistent with his explanation that he was apologising for saying hurtful things to the complainant in arguments.

61. MM rejected this interpretation of the messages, saying that the reference to being “*behind bars*” could be a reference to his being imprisoned in his thoughts. He said that the reference to handing himself in could mean something different to confessing to the police that he had done something criminal. He said he did not know the context and it could mean something else. MM suggested that the complainant could have sent the text messages from his phone herself, trying to frame him, building a case against him so that she could leave the marriage.
62. Ms Earis pointed out that MM had not denied that the messages were sent by him during his interview under caution, but rather said that he could not *remember* sending them. She suggested that he was playing for time in the interview, trying to think of a response, and then came up with the suggestion that the complainant might have sent the messages herself from his phone.
63. MM rejected this, saying that English is not his first language, so perhaps that is why he said he did not remember sending them instead of that he did not send them.
64. Ms Earis read out passages from the messages from the complainant that follow: “*You have no idea the damage rape does*” (page 298 of the Upper Tribunal appeal bundle), and on the following page “*...it’s the sex and control...The betrayal of you raping me so violently whilst I was pregnant...is too much for me*”. Ms Earis put to MM that these were explicit allegations that he had raped the complainant, to which he responded that this was “*her description*” and “*your [i.e. Ms Earis’s] view*”.
65. Ms Earis put to MM that at this criminal trial his case had not been that the messages purporting to be from him were actually sent by the complainant, but rather he accepted that he had sent the messages in the conversation but the way they were presented was misleading, having been manipulated by the complainant to support her false allegations. In his evidence to the Upper Tribunal MM said that the complainant could have both sent messages from his phone purporting to be from him and doctored messages that he did send in order to present her desired narrative. MM said that he did send some messages apologising to the complainant for arguments, and that the complainant had presented those messages in a misleading way to look as if they related to her accusations of rape. He said that the police officer friend of the complainant who had been shown messages on the complainant’s phone had seen only a few messages and the complainant had kept the phone, so the messages could have been presented out of context.
66. Ms Earis took MM to another message on page 301 of the Upper Tribunal appeal bundle, in which he says, apparently in response to a long message from the complainant in which she had described violent anal rape: “*No one should ever treated anyone like that they love. If anyone did that to me, you or kids I will kill them... Alcohol or no alcohol this was evil what I did and sorry doesn’t even cut it.*” Ms Earis suggested that MM saying that he would kill someone who behaved in the way that he had, and describing his behaviour as “*evil*” was inconsistent with his case that the message was an apology for saying hurtful things in an argument.
67. Ms Earis took MM to a further passage in the same message: “*I was drunk, obsessed with anal sex and it got out of control*”. She said that this was him

admitting to being obsessed with anal sex and to have forced it. MM agreed that the message appeared to say that, but that it was not true.

68. Ms Earis then took MM to the email from MM's email address to a marriage counsellor (at page 303 of the Upper Tribunal appeal bundle), which reads *"We are currently separated for over a year now due to infidelity on my part and sexual trauma I inflicted a few years ago"*. MM denied having sent that message, saying that he and the complainant shared the use of a laptop and that the complainant had used his email to send the message. He said that the complainant was trying to build a case against him, to show that he had admitted to something that he had not done.
69. Ms Earis then took MM to the judge's summing up of the counsellor's evidence at the Crown Court trial (at page 416 of the Upper Tribunal appeal bundle), which was that the complainant *"told me about a serious incident in 2013. She said she had been anally raped when she was four months pregnant."* The counsellor reported that MM *"initially did not refute it had happened but said it had not happened in the way which she described."*
70. Ms Earis pointed to what was said in the judge's summing up at page 417 of the Upper Tribunal appeal bundle: *"[MM] initially denied it. Shortly after that, he agreed that he had lost control and regretted doing what he had done. Once he had acknowledged what he had done, he became conciliatory and expressed his regret quite a few times after that... He said there were different cultural norms where he grew up and that men had the right to have sex when they wanted it..."* The counsellor reported that there had been discussion of the police, and whether the complainant was going to *"press charges"* or not. Ms Earis said that it was clear from this that they had been discussing a criminal offence having been committed because one cannot *"press charges"* over hurtful things said in an argument, but only for breaking the law.
71. In response MM said he denied the allegations in court, the counsellor had been cross-examined about her evidence, and the conversation had been completely misinterpreted. He said the counsellor had herself been raped and he thought that this affected her evidence. MM said he had not admitted to any rape to the counsellor.
72. Ms Earis took MM to the judge's summing up at page 417 of the Upper Tribunal appeal bundle, where he said that the counsellor had been taken to her therapy notes in re-examination and had underlined MM's name and then written *"Deeply sorry for rape, plus shame"*. MM said that he did not say sorry for any rape and reiterated that any apology related only to arguments.
73. Ms Earis put to MM that the counsellor was someone whom neither he nor the complainant had known before they contacted her for counselling. MM said that the counsellor could have been a friend of the complainant's mother, who was herself a psychotherapist.
74. Ms Earis took MM to the judge's summing up of the evidence of the complainant's parents about a meeting at the Coy Carp pub. The complainant's mother is reported to have asked MM *"What did you do to my daughter? I know what you did but I want the words"*, to which MM is reported to have said *"rape"*. The complainant's father's evidence was that while there was discussion of rape, and

MM said the word “*rape*”, he did not admit to raping the complainant. In his evidence at the hearing before the Upper Tribunal MM said there was no discussion of rape at all.

75. Ms Earis put to MM the inconsistency between the case he had argued in the Family Court and his case in the criminal proceedings: before the Family Court he said that after going out with their friends they had had anal sex in their car (i.e. there was consensual anal sex) but before the criminal court his case was that he had never had anal sex with the complainant. MM accepted that this may have been what he said, but maybe he forgot. He said that it did happen one time in the car but not at the time that they said it did. Ms Earis took MM to the summing up of his evidence in the criminal trial (at page 424 of the Upper Tribunal appeal bundle) where the inconsistencies in his evidence were put to him. The explanation he gave to us was that the events in question were a long time ago, that he was under pressure in court and got confused, and he suggested that the lack of clarity was perhaps as a result of his uncertainty as to whether he and the complainant had “successfully” had anal sex. Ms Earis suggested that MM’s evidence could not be relied upon because he just said whatever he thought would be helpful to his case.
76. Ms Earis asked MM about the proceedings brought against him by The Nursing and Midwifery Council in relation to his failure to notify them of the Caution or the 2013 Allegations. MM said that this was a mistake, it occurred when his father had recently had a heart attack and the complainant had been diagnosed with cancer, and the need to notify his regulator had simply slipped his mind. MM said that he had owned up to this omission and apologised, but Ms Earis pointed out that his explanation had not been accepted.
77. In response to questions from the panel about why the complainant would have been motivated to go to elaborate lengths to frame him for rape at a time when he had returned to live at the family home and were trying to repair their relationship, MM said that the complainant was a jealous, possessive, obsessive and manipulative person, and was aware of how to play the system to get what she wanted. He said that framing him was a way of her punishing him if she could not have him. He said that her ultimate goal was for him to go to jail and be deported.
78. At the end of the hearing the panel reserved judgment.

### **Post-hearing evidence and submissions**

79. On 2 May 2025 the DBS contacted the Upper Tribunal to notify it that on 28 April 2025 it received further disclosure from the Crown Prosecution Service in relation to the Crown Court trial of the 2013 Allegations, including an “Agreed Facts” document and a copy of the WhatsApp messages referred to by the judge in his summing up at the end of the Crown Court trial (the “**Further Information**”). The DBS said that it considered the Further Information to be highly relevant to the issues in the appeal.
80. On 3 May 2025 Upper Tribunal Judge Church made Directions requiring the DBS to provide MM with a hard copy of the Further Information and to upload the Further Information to the Document Upload Centre as soon as reasonably practicable. Upper Tribunal Judge Church directed the DBS to make a written

submission setting out its position on the appeal in the light of the Further Information within 28 days of my Directions being issued, and directed MM to make a written submission setting his position on the appeal in the light of the Further Information not later than 28 days after the date he received the Further Information.

81. On 23 May 2025 Ms Earis, for the DBS, made a submission to the effect that the Further Information further supported the DBS's findings of fact and the Barring Decision. MM did not comply with the Directions of 3 May 2025 to provide a submission within 28 days of receiving the Further Information.
82. On 24 July 2025 MM wrote to the Upper Tribunal by email asking for an update on the progress of his appeal. In it he reiterated his position that the WhatsApp messages were screenshots that had been doctored by the complainant, omitting important parts of the conversation to support the complainant's agenda. That email was treated as MM's written submission and the panel proceeded to make its decision on the appeal.

## Analysis

### Ground 1

83. MM vehemently denied the 2013 Allegations. He said the text and WhatsApp messages relied upon by the DBS were either written by the complainant rather than him, or were doctored by the complainant to suggest that he was guilty of the 2013 Allegations, or some were sent by the complainant and others sent by MM and doctored by the complainant. He accepted that he had repeatedly apologised to the complainant for his conduct towards her, but insisted that all he had apologised for was his saying hurtful things to her during the course of arguments, and nothing more. MM's case was that the messages were not what they seemed.
84. MM says that the counsellor who claims to have witnessed him admit to rape was impartial and unreliable. He also denies making any admission (whether explicit or implicit) to the complainant's parents at the Carp Coy Carp pub that he raped the complainant. He pointed to the evidence of another therapist whom he and the complainant had seen for an extended period, and who said that rape allegations were never discussed in their sessions together.
85. The Additional Information includes lengthy transcripts of text and WhatsApp messages exchanged between MM and the complainant.
86. We considered carefully MM's explanation that the messages refer only to his having said hurtful things, his alternative explanation that the messages seemingly sent by him were in fact written by the complainant, and his further explanation that those messages, while written by him, had been manipulated and presented out of context. We found each of these explanations to be unlikely.
87. Having had the opportunity to review the Additional Information, we consider the text and WhatsApp "conversations" to be both genuine and complete.
88. As such, they demonstrate MM's acceptance that he raped (and attempted to rape) the complainant. Read in context, the messages clearly do not refer to his having said hurtful things during arguments.

89. Further, we find that the reason MM accepted the allegations was because the allegations were true.
90. While we do not find MM's version of events to be completely impossible, we do find it to be improbable, and we consider the facts that DBS found to be much more likely. That assessment of the evidence is consistent both with the jury's decision to acquit MM of the criminal charges at the Crown Court trial (on the basis that they were not "sure" of all elements of the charges on the indictment), and it is also consistent with the Barring Decision (which was reached on the balance of probabilities).
91. Ultimately, none of the new evidence before us (either the oral evidence at the hearing or the Further Information supplied post-hearing), when read with the evidence that was before the DBS, persuades us that the DBS reached the Barring Decision based on any material mistake of fact. The DBS was entitled to make each of the factual findings it made. We therefore dismiss Ground 1.
92. Proceeding on the basis that MM did rape, and attempt to rape, the complainant MM's other grounds of appeal can be dealt with relatively briefly.

#### Ground 2

93. By Ground 2 MM argued that the Respondent erred materially in fact and/or in law in reaching its finding that MM poses an ongoing risk to vulnerable adults and children. The evaluation of risk a core function of the DBS which engages its special expertise, and findings as to the risk of harm that an individual poses are not conventional findings of fact (see **AB**, discussed in [37] and [42] above). The Upper Tribunal can interfere with its exercise of that function only if the DBS's decision making involved an error of law.
94. We have decided that the DBS was not mistaken in finding the 2013 Allegations to be made out, and MM has accepted the fact of his having committed the Caution offence. The issue whether the DBS was entitled to conclude that MM represented an ongoing risk must therefore be approached on the basis that he has failed to control his violent sexual urges on two separate occasions, and he failed to control his violent urges on another occasion in the context of the Caution offence. In this context the DBS was clearly entitled to identify concerns about MM having an entitlement to sex (see pages 335-336 of the Upper Tribunal appeal bundle), exploitative attitudes (see page 336 of the Upper Tribunal appeal bundle), callousness (see page 338 of the Upper Tribunal appeal bundle), poor emotional arousal and urge concerns (see page 340 of the Upper Tribunal appeal bundle). Further, while MM accepted the Caution offence, he has consistently denied the 2013 Allegations, thereby demonstrating a lack of insight into, or remorse for, his actions. For all these reasons we dismiss Ground 2.

#### Ground 3

95. By Ground 3 MM argued that the DBS erred in law because it failed to consider its own guidance when it made the Barring Decision without considering transcripts of the criminal proceedings which concerned the same allegations, and which ended in MM's acquittal of all charges.

96. It is a principle of public law that public bodies should ordinarily factor into their decision making any published policies. The DBS has published a policy on “*Making Findings*”. The policy states:

*“If an individual has been charged with an offence/s but was subsequently not convicted at court, we can and should consider the allegation/s behind the offence if relevant, assessing the evidence on the balance of probabilities. When dealing with a case where there has been no further action or no conviction following charge ask:*

- *Why was there no conviction/police took no further action?*
- *Why did the case not proceed?*

*There are a number of possible reasons for non conviction or no further action. You may need to obtain further information that will enable you to have a better understanding of what happened and whether it affects our findings. The following sources of information may be available and could assist with determining any reasons for the decision made during the proceedings: Court transcript, summary from the Court detailing reasoning for / stage in proceedings a defendant was acquitted (Judge directed or post Jury consideration), Judge’s Summing Up.”*

97. This policy falls very far short of a legal requirement that the DBS must obtain a copy of the transcript of the Crown Court trial before reaching its own findings on the 2013 Allegations. It was certainly incumbent on the DBS to reach its barring decisions in a way that was fair. The DBS was required to consider the evidence before it and to decide whether that information was adequate for it to reach a fair decision on MM’s case. There was a full trial of the charges against MM, with the matter being put before the jury for its verdict. While there is no express discussion in the Final Decision Letter or the Barring Process Document of the DBS decision maker having considered whether court transcripts should be obtained, it was unlikely in those circumstances (despite what the “*Making Findings*” policy says) that obtaining a court transcript would have assisted the decision maker in understanding why MM was acquitted. We are not persuaded that the DBS’s failure to consider obtaining a court transcript amounted to a mistake of law.
98. By the time that the Upper Tribunal considered the appeal a transcript of the judge’s summing up of the evidence was available. Perhaps unsurprisingly, that transcript does not assist us to understand why MM was acquitted. All we can know is that the jurors were not “sure” that each element of the offences described in the indictment was present. From the judge’s summary of the evidence of the witnesses whose police statements were relied upon by the DBS, it appears that their evidence was largely consistent with what they had said in their police statements, and there were some inconsistencies in MM’s evidence as between the account he gave in his police statements, what he said in the Family Court proceedings and what he said in his evidence at trial.
99. Even if the DBS’s failure to consider whether it should have obtained the transcript of the Crown Court proceedings did amount to a mistake of law, we are not persuaded that such a mistake would have been material because nothing in the transcript that we considered cast doubt on the DBS’s findings (which we

have confirmed, as discussed in relation to Ground 1 above). We therefore dismiss Ground 3.

#### Ground 4

100. By Ground 4 MM argued that the DBS made a material mistake of law in failing to take into account the decision of The Nursing and Midwifery Council to close the case against MM at the screening stage. We do not find this ground persuasive because the mere fact of the regulator deciding not to pursue disciplinary proceedings against MM did not prevent the DBS from making its own findings based on the evidence before it. Indeed, the DBS had a statutory duty to make its own findings based on the evidence before it. We have explained in relation to Ground 1 above why we considered that the findings the DBS made were not mistaken.

#### Ground 5

101. By Ground 5 MM argues that the DBS erred in law when it concluded that MM was likely to repeat the misconduct which was the subject of the Caution offence. This ground of appeal overlaps to a large extent with Ground 2 (discussed at paragraphs [90] to [91] above). For the same reasons explained above in relation to Ground 2, the evaluation of risk was a matter that the DBS was well placed to assess. The DBS gave reasons for its determination that the risk of MM repeating that conduct was impermissibly high notwithstanding the fact of his having received no further cautions or convictions for similar conduct since the date of the Caution. The DBS's decision making in this regard was based on the totality of the evidence, and on its finding that MM had lost control not only on the occasion that resulted in the Caution, but also on two separate occasions when he had sexually assaulted the complainant with considerable violence. The DBS's finding as to risk in this regard was well within the range of reasonable findings open to it on the evidence before it and was not otherwise irrational or unreasonable. We therefore dismiss Ground 5.

#### Ground 6

102. By Ground 6 MM argued that the Barring Decision was, in all the circumstances, disproportionate because of the adverse impact that it had on MM's life, including his Article 8 right to respect for his private and family life.
103. The DBS found MM to have committed three crimes of violence: an assault on a teenage child in his care, and two serious violent sexual assaults on the complainant. Having identified concerns that MM considered himself to be entitled to sex, held exploitative attitudes, and exhibited callousness, poor emotional arousal and urge concerns, it assessed that there was an unacceptable risk that he might repeat such violent conduct. In those circumstances even a very substantial interference with MM's rights was clearly justified in the public interest to protect children and vulnerable adults from harm. We consider that the Barring Decision was clearly proportionate given the seriousness of the "relevant conduct" relied upon and the ongoing concerns identified by the DBS. We therefore dismiss Ground 6.

**Conclusion**

104. The Barring Decision was not based on any material mistake of fact and it involved no material mistake of law. It is confirmed.

**Thomas Church  
Judge of the Upper Tribunal**

**Roger Graham  
Tribunal Member  
Suzanna Jacoby  
Tribunal Member**

Authorised by the Judge for issue on 13 October 2025