



**The Upper Tribunal  
(Administrative Appeals Chamber)**

**UT NCN: [2026] UKUT 4 (AAC)  
UT Case Number: UA-2025-000477-V**

**Summary: Safeguarding Vulnerable Groups (65.9)**

*Safeguarding Vulnerable Groups Act 2006 - section 4(2)(b) – appellant was included in both barred lists on a finding that she had fallen asleep on successive waking night shifts – DBS relied on a description by her employer of a recording made by the service user’s family – the recording was not available to DBS or the Upper Tribunal – tribunal found that appellant had shown a mistake of fact in that she had not fallen asleep, but remitted the case to DBS for a new decision on the basis that she had put herself into a position where she could have fallen asleep.*

**Before**

**UPPER TRIBUNAL JUDGE JACOBS  
TRIBUNAL MEMBERS JACOBY AND TURNER**

**Between**

**IM**

**Appellant**

**v**

**Disclosure and Barring Service**

**Respondent**

**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) IM, who is the Appellant in these proceedings;**
- (b) the service user 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.

Decided on 30 December 2025 following an oral hearing on 19 December 2025.

**Representatives**

Appellant: Fola Ajala Advocate of Graceland Solicitors Ltd, instructed by Defank Solicitors  
DBS: Bronia Hartley of counsel, instructed by DBS Legal Department

**DECISION OF THE UPPER TRIBUNAL**

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

DBS reference: 01044297165  
Decision letter: 10 January 2005

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

As DBS made a mistake in the findings of fact on which its decision was based, the Upper Tribunal, pursuant to section 4(6)(b) and (7)(a) and (b) of SVGA:

makes findings of fact and remits the matter to DBS for a new decision; and  
directs that the appellant remain in the lists until DBS makes its new decision.

**REASONS FOR DECISION**

**A. DBS’s decision**

1. On 10 January 2025, DBS included IM in the children’s barred list and the adults’ barred list on this finding of relevant conduct:

On 12 July 2024 to 13 July 2024 and on 13 July 2024 to 14 July 2024, during your waking night shifts, when you were meant to be providing care for a service user, you slept for a total of approximately 3 hours on the first shift, and a total of around 1.5 hours on the second shift.

The DBS considered two further allegations, but found that they had not been proved.

**B. The grant of permission**

2. IM set out some grounds of appeal when she applied to the Upper Tribunal for permission to appeal. When DBS provided its full documentation, Judge Jacobs allowed IM to amend her grounds in the light of what those documents contained. Defank Solicitors submitted amended grounds on 25 July 2025. Judge Jacobs gave permission on those grounds. He warned her that she would only be allowed to rely on other grounds if the Upper Tribunal gave her permission to do so. That is in accordance with the decision of the Court of Appeal in *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982 at [97]. The procedure was explained in Section III of *KS v Disclosure and Barring Service* [2025] UKUT 45 (AAC). In the event, IM did not apply for permission. Nor did she apply for an oral reconsideration of the limited grant of permission under rule 33(3)(b) and (4)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698). Accordingly, we consider only the grounds on which permission was given.

3. This is how the solicitors summarised the amended grounds:
  1. The DBS was wrong to find that the Applicant endangered or was likely to endanger a vulnerable adult in her care and that in similar situations would neglect vulnerable adults and thus harm them or put them at the risk of harm, or failed to provide adequate reasons for that finding.
  2. The DBS was wrong to find that the Applicant may harm/represents a risk of harm to children, or failed to provide adequate reasons for that finding.
  3. The DBS was wrong to find it was proportionate to bar the Applicant from working with vulnerable adults and/or children, or failed to provide adequate reasons for that finding.
  4. The DBS was wrong to have relied on reasons not taken by the employer as an important part of its decision to bar.

**C. Employment issues**

4. In his opening remarks, Mr Ajala mentioned some issues around the way that IM's employer had handled her case and her dismissal. As we explained to him, those issues are outside the Upper Tribunal's jurisdiction on this appeal. Our jurisdiction is limited to matters relevant to DBS's decision to include IM in the barred lists.

**D. The legislation**

*The barring provisions*

5. These are the provisions of Schedule 3 SVGA that apply to the children's barred list.

*Behaviour*

**Paragraph 3**

- (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 children, and
  - (b) DBS proposes to include him in the children's barred list.
- (2) DBS must give the person the opportunity to make representations as to why he should not be included in the children's barred list.
- (3) DBS must include the person in the children's 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 children, and
  - (b) it is satisfied that it is appropriate to include the person in the list.

(4) This paragraph does not apply to a person if the relevant conduct consists only of an offence committed against a child before the commencement of section 2 and the court, having considered whether to make a disqualification order, decided not to.

(5) In sub-paragraph (4)–

(a) the reference to an offence committed against a child must be construed in accordance with Part 2 of the Criminal Justice and Court Services Act 2000;

(b) a disqualification order is an order under section 28, 29 or 29A of that Act.

**Paragraph 4**

(1) For the purposes of paragraph 3 relevant conduct is–

(a) conduct which endangers a child or is likely to endanger a child;

(b) conduct which, if repeated against or in relation to a child, would endanger that child 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 child, if it appears to DBS that the conduct is inappropriate.

(2) A person’s conduct endangers a child if he–

(a) harms a child,

(b) causes a child to be harmed,

(c) puts a child at risk of harm,

(d) attempts to harm a child, or

(e) incites another to harm a child.

(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.

6. These are the provisions of Schedule 3 SVGA that apply to the adults’ barred list.

*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*

- 7. 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.

...

### **E. Some background**

8. IM came to this country in October 2022. Before that, she had worked as a carer for a decade in her home country. After a short period of shadowing, she began working as a community carer through an agency. She prefers to work night shifts, because that fits best for her around caring for her disabled child. She does not drive, so she can only reach a service user's home by public transport or a taxi. Until July 2024, she had worked for the employer without incident. We know of no other incidents in her career apart from the ones mentioned in DBS's findings.

### **F. Our approach to the case**

9. The burden of showing a mistake rests on IM. See the Presidential Panel in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC) at [8].

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

11. 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

...

12. Our assessment of the evidence is made with the benefit of the practical knowledge and experience that the specialist members bring to this jurisdiction. We refer to what the Upper Tribunal said about their qualifications for appointment in *CM v Disclosure and Barring Service* [2015] UKUT 707 (AAC) at [59] to [64].

13. 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 10 January 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.

### **G. Evidence – the video recording**

14. IM spent most of her time on shift in the sitting room of the service user's home. There was a camera in the room, which recorded intermittently. The only people who have seen the recording are the service user's family and IM's employer. IM herself was not shown it by her employer. DBS did not see a copy, but relied on the description of what it showed that had been written by an assistant manager. There was also a camera in the service user's bedroom, but the family reported that it had not been working.

15. On 20 June 2025, Judge Jacobs gave a direction to DBS with a view to the recording being available to the parties and the tribunal:

I direct DBS to take all reasonable steps to obtain a copy of the recording made by the service user's family. As I understand it, DBS did not see this recording, but relied on a description given by IM's employer. DBS will, no doubt, say that that description is sufficient. Against that, the Upper Tribunal will need to consider two factors if I give permission to appeal. First, there have been cases in which the descriptions have not been accurate. Second, it is relevant to ask why IM would undermine her credibility by denying something that can be contradicted immediately by viewing the recording.

He repeated that direction in his grant of permission on 12 August 2025.

16. On 13 August 2025, DBS wrote to the Upper Tribunal as follows:

The Respondent [DBS] has sent several emails to the Applicant's former employer ... and the Service User's wife requesting a copy of the CCTV footage. The Applicant's former employer has been informed by the Service User's wife that she has received the Respondent's email requesting a copy of the CCTV footage. However, the Service User's wife has reviewed the data from her home cameras and, unfortunately, she can only go back to December 2024 and cannot access earlier footage. Therefore, she has confirmed that she no longer has the requested footage.

17. We accept that DBS has done all it realistically could to obtain a copy of the recording. The result is that the only evidence we have of what it showed is the description given by the assistant manager. This is her record, taken from the report under section 42 of the Care Act 2014:

From looking through footage from 10pm on the 12th July through to 7am on the morning of the 13th July where staff member was on shift I noticed that between the hours of 2:30am (13th July) until 04:00am (13th July) the staff member was sleeping on the sofa with a blanket and her feet up. She is then seen at 04:00am to get up and go and check on Mr X. She comes then back into the living room at 04:01am and lays back on the sofa where she is then found to stay here sleeping until 05:25am where she is seen to wake and check her mobile phone, lays back

down until 05:35am and then gets up again to go and check on Mr X. After these hours she is awake and alert on the sofa until the end of her shift and is seen to check on Mr X before leaving at 06:45am. ... [T]he Carer is seen to sit up on the sofa at 06.36am from lying down, ... the camera then cuts out from 06.37am until 06.41am where the Carer then gets up and goes to check on Mr X. ... A lot of the footage is missing as the camera does not record every minute of every hour, unsure if this is due to no motion or a system failure.

I then looked through the footage from 10pm on the 13th July through to 7am on the morning of the 14th July where same staff member was on shift again. ... The camera footage cuts out from 22.55pm until 23.01pm where the Carer ... is just sitting on the sofa.

Between the hours of 23.01pm until 1:55am the staff member is seen to just sit on the sofa, seems to be awake and alert and checks on Mr X up to 4 times that can be seen on footage. Then from 1:55am the staff member moves to the other sofa, removes her shoes and lays down from then until 03:30am (between those hours there is not footage as the camera cuts out) at 03:30 am she is seen to be awake and on her mobile phone but still in the same position as she got into from 1:55am. Between 03.30am and 05:00am the staff member is asleep on the sofa again, at 05:05am she gets up and checks on Mr X then returns to the sofa, she is seen at intervals on the camera to be awake and alert at 06:05am and goes to check on Mr X. She is then awake and alert until the end of her shift at 7 am.

The Carer was aware of the presence of the camera as it is clear to see on the mantel piece underneath the TV in the lounge right opposite the sofa and armchair. This also would have been noticeable in the dark as there is a light showing it's recording.

18. IM is variously called 'the staff member' and 'the Carer'. Mr X is the service user. We have removed references to other allegations against IM that were not found proved either by her employer or by DBS.

19. IM denied falling asleep. She denied using a blanket. She told us that she did not have one and never used one, even if offered one by a service user's family. She also denied knowing that there was a camera recording her. When asked specifically, she said she had not seen a green light. We accept IM's evidence that she did not know she was being filmed. Her denial is a statement against her interest, as it prevents her from saying that she would not have allowed herself to fall asleep as she knew she was being recorded.

20. We can be sure that the assistant manager did not accept the family's word about what the recording showed, because she did not accept two of the allegations they had made. Neither did DBS. Despite IM's suggestions that the manager wished to dismiss her, we have no reason to doubt the integrity of the manager's description of what she saw on the recording. But there is a lot that we do not know about what was visible on the recording. We do not know how clear the image was. This would depend on the quality of the equipment, its location relative to IM, and on the light level in the room – the assistant manager's note refers to the green light being 'noticeable in the dark'. We do not know if there was any audio. And the description does not mention IM making any record. She told us that she had been making notes of the care she was giving

and there is mention in the papers of a log. Presumably these are the same document. They might have allowed us to check the accuracy of the description.

21. Given those limitations, we have been troubled by having to rely on the manager's word that IM was asleep. To check on this, we have looked at the precise language that the manager used. She does not simply record that she saw IM asleep. She refers to IM: (a) lying back on the sofa; (b) taking her shoes off; and (c) covering herself in a blanket. And this language contrasts with IM being awake and alert and performing activities like checking her phone or going out of the room.

22. We have also been troubled by the gaps in the recording. The notes refer to this several times. The first paragraph of the note deals with the recording of the first shift on 12-13 July. It mentions that the camera cut out between 06.37am and 06.41am, but adds at the end that 'A lot of the footage is missing'. That must mean that there were gaps in addition to the one mentioned. The remaining paragraphs deal with the recording of the second shift on 13-14 July. This makes it clear at what times the camera was not recording. We can tell that the manager has not drawn any inferences that IM was sleeping during those times. Given the care taken when describing the second shift, we accept that the manager would not have drawn inferences when the equipment was not working during the first shift.

23. IM gave evidence that is relevant to the allegation that she was sleeping. She told us that she was used to being awake during the night, because of the needs of her disabled child and from working night shifts. But she also told us of the journey to Mr X's home, which left her 'very fatigued and stressed from the walking and jogging I went through' to reach the home for the first shift. In those circumstances, it would not be surprising if she had felt tired during the shift. On the other hand, given her reliance on public transport or taxis, she would have experienced stressful journeys before, and she had taken her laptop to help her stay awake. She also explained that she lifted her feet clear of the family's dog when it was walking around – she is scared of dogs.

## **H. Evidence – the telephone call**

24. On 17 July 2024, the assistant manager of IM's employer called her. This is the record she made of the call:

### **Notes in relation to the discussion had with IM on 17/07/2024 regarding her dismissal.**

I called IM on 17/07/2024 in the afternoon following investigations that had been ongoing since the day before 16/07/2024 following reports of IM being asleep during waking night shifts with a SU [service user] between the dates 12/07/2024 and 14/07/2024. Legal advice was also sought, and employment law said this could be an instant dismissal from her duties due to serving less than 2 years with the company. They advised a telephone conversation could be had which would be sufficient following a letter of dismissal.

When I spoke to IM, I explained that reports had been made of her sleeping on shift and a formal complaint had been put in by the service user's family member. Firstly, IM denied that she had slept whilst on shift and said she was checking on the service user throughout. I explained that I had seen footage and proof that at different times during both night shifts she was asleep for up to 90 minutes.

Agreed with her that I could see she had checked on SU during the night as well but said that during the times she was asleep an incident could have happened that she wouldn't have woken to and put the SU safety at risk. I explained we had a duty of care following this type of report, so a safeguarding referral had also been made. IM asked what would come of this report and I explained I wasn't 100% sure but ongoing investigations would take place to ensure the safety of service users. I asked IM if she had anything else to say and she didn't. I told her that due to the above incident that no more shifts will be allocated to her, and we would be dismissing her from employment as of today. She asked for it to be put in writing so I confirmed this would be done via email.

Signed – ... – Assistant Manager.

25. Ms Hartley put to IM that she had first denied sleeping on shift, but then did not comment when told there was a video recording. IM replied that the assistant manager was not interested in listening to what she had to say.

26. We have already explained that we accept IM's evidence that she was not aware of the camera. This note is useful in showing that *at least from the date of the telephone call* IM knew there had been a recording. Whatever she said after that was said with that knowledge. Otherwise, we attach no significance to this evidence.

27. IM's failure to comment further is not relevant to whether or not she was sleeping on shift. The note is not presented as verbatim or complete. We have no reason to doubt that it is accurate in what it states. But we accept IM's evidence that the assistant manager was not interested in hearing her side of what happened. The first paragraph shows that the employer had already taken legal advice and was going to dismiss her, as was done on the same day as the call. The main reason for the call was to inform IM of that decision. It was not part of an investigation to decide what had happened or whether IM should be dismissed. IM probably picked up from the tone of the conversation where it was leading.

28. There is a slightly different account under the 'List Actions required and if completed' in the section 42 report. We prefer the note we have quoted, as it appears to be a record made during or around the time of the telephone call. In contrast, the report, according to DBS's index, was completed on 31 July 2024.

#### **I. Mistake of fact (section 4(2)(b)) – conclusions**

29. As we have said, it was for IM to show that DBS made a mistake in its findings of fact. We have decided that she has done so. We have taken account of the whole of the evidence. The relevant fact is whether IM slept on a waking night shift. The most important evidence is the description of the recording. We have set out the qualities and deficiencies of that description. Our conclusion is that, on the balance of probabilities, there was a mistake in DBS's finding. Despite the care that the assistant manager took to be accurate, she did not record anything about the quality of the recording. Nor did she say why she came to the conclusion that IM had been asleep, as opposed to lying back on the sofa or just resting.

30. It should have been possible for IM to stay awake. She had not received any advice from the employer on how to remain alert and awake, but as Ms Hartley pointed out, she had common sense to guide her, and she had her experience. IM also told us

that she took her laptop with her to help her stay awake, so she was alert to the risk. When questioned by the panel, she also showed that she understood the dangers that might befall the service user if she were not awake and alert to go to his aid.

31. Although DBS made a mistake by finding that IM fell asleep on two successive night shifts, the evidence shows that IM put herself into the position where she could have fallen asleep. She certainly lay back on the sofa with her feet off the ground for periods of time. That is why we have remitted the case to DBS for a new decision on that basis. The decision may result in IM remaining in the lists or it may not. That is not a matter for us.

**J. Proportionality (section 4(2)(a) SVGA)**

32. As DBS made its assessment of proportionality on the basis that IM had fallen asleep, it will have to make a fresh assessment when it makes a new decision. In those circumstances, we prefer not to comment on the assessment that was made.

**Authorised for issue  
on 30 December 2025**

**Edward Jacobs  
Upper Tribunal Judge  
Suzanna Jacoby  
Matthew Turner  
Members**