



NCN: [2026] UKUT 56 (AAC)
Appeal No. UA-2025-000182-V

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

KCN

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) KCN, who is the Appellant in these proceedings;**
- (b) SU, who is the service user mentioned in the documents and 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.

Before: Upper Tribunal Judge Jacobs
Tribunal Members Bainbridge and Graham

Decided on 05 February 2026 following an oral hearing on 28 January 2026.

Representation:

Appellant: Oluwole Ogunbiyi of counsel

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

Summary: Safeguarding Vulnerable Groups (65.)

Safeguarding Vulnerable Groups Act 2006 - section 4(2)(b) – allegation by service user of rape and assaults by the appellant – he was acquitted in the Crown Court - DBS was entitled to find the allegation proved on the balance of probabilities.

DECISION OF THE UPPER TRIBUNAL

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

DBS reference: 01031170346

Decision letter: 21 November 2024

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 21 November 2024, DBS included KCN in the children’s barred list and the adults’ barred list on the following finding of relevant conduct:

you kissed an adult service user, fondled her breasts and forced her to suck your penis on 04/12/2017.

2. Upper Tribunal Judge Jacobs gave permission to appeal on the ground that there was a realistic prospect of KCN showing that the relevant conduct was not proved on the balance of probabilities. Permission was given without an oral hearing. KCN 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)).

B. Some background

3. This case arises from a complaint made against KCN by SU, a female service user. Sadly, she died in August 2021. She reported to KCN’s supervisor, who called the police. She also made statements to the police. On the basis of her report and statements, KCN was tried in the Crown Court on three counts: (a) rape of a woman aged 16 years or over; (b) sexual assault on a female; and (c) sexual assault on a female. On 19 August 2023, KCN was found not guilty. That means that the jury was not sure that he was guilty on any of the counts, which is the criminal standard. We do not have a transcript of the trial, but we do have a copy of the judge’s summing up to the jury.

C. The legislation

The barring provisions

4. 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.
5. 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

6. 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. DBS's reasoning

7. This was how DBS explained its decision in the letter of 24 November 2024:

Having considered this, DBS is satisfied you engaged in relevant conduct in relation to vulnerable adults. This is because you have engaged in inappropriate conduct of a sexual nature involving a vulnerable adult.

It is also considered that you have engaged in relevant conduct in relation to children, specifically conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him or her.

We are satisfied a barring decision is appropriate. This is because you state that given the circumstances of the case, the full and thorough investigation, your consistent denial and the acquittal by a jury following a trial it is not appropriate for the DBS to decide that the allegation is proven on 'the balance of probabilities'. However the DBS have taken into consideration that the female victim died prior to the trial and was therefore unable to present her evidence in person. The DBS also concluded that whilst the female had a history of hallucinations and making accusations, none had previously been directed at any particular individual. The DBS also took into account that you stated you'd washed your hands prior to picking up the bottle of bleach, which would make it less likely for your semen to be found on it. You also didn't explain why the cap had your semen on it and that CCTV footage showed you were in the females flat for approximately 11 minutes,

not the 5 minutes you claimed. Following a consideration of the credibility and reliability of the evidence the DBS are minded to prefer the account of the female and find it more likely than not that you acted in the manner described, a lower burden of proof than that of 'beyond reasonable doubt made by the jury.

The DBS is therefore satisfied that you demonstrated harmful behaviour triggered by a service user's refusal to comply with a request for sex and that you forced the service user to engage in sexual activity against her will. The DBS is satisfied that you manipulated the circumstances and abused a position of responsibility to take advantage of a service user in your care when she was suffering from poor mental health and threatening suicide by drinking bleach. The DBS is concerned that your behaviour was characterised by a complete disregard for the wishes or impact on the victim of your behaviour.

The DBS is satisfied that you were irresponsible and reckless in that you identified and pointed out a bottle of bleach to the service user and did not remove this when you left the premises, despite her suicidal ideation. You did not address this in your representations and the DBS is therefore satisfied that you failed to meet the needs of a service user in your care and failed to meet the obligations of your role which left service user in danger of harming themselves.

It's acknowledged that you stated you continued to work in regulated activity for a further 2 years following the allegation with no concerns, however your representations did not provide any evidence to support this.

The DBS is satisfied the evidence therefore shows that vulnerable adults could be at risk of sexual and emotional harm from you and the DBS is concerned you may sexually assault vulnerable adults were you to engage in regulated activity in the future.

In consideration of the Children's list, given you exploited, coerced and manipulated someone more vulnerable than you, the DBS also have significant concerns that you may perpetrate sexual abuse against children, particularly older teenage children, for your own sexual gratification, were you to engage in regulated activity with them.

The potential level of harm if you repeated your behaviour is considered significant and the DBS is satisfied your behaviour indicates the need to impose a preventative mechanism in order to protect children and vulnerable adults.

The interference with the human rights of those concerned has been considered (Article 8 - European Convention on Human Rights). You have a right to a private and family life. It is clear that a decision to bar you has the potential to have a detrimental impact on that right as it could well limit your future employment opportunities, (given your application to become an SEN Learning Support Assistant), and as such impact on your finances and therefore your family life. It is also acknowledged that there may be a personal impact due to the potential stigma attached to such action. However consideration needs to be made of the vulnerable people you could be responsible for were you to work in regulated activity in the future, as they enjoy equal rights.

Having considered all of the facts in this case the DBS is satisfied there is a future risk to those vulnerable people who you could have responsibility for and the DBS is satisfied that the level of future harm would have a significant negative impact

on those vulnerable people in terms of their sexual and emotional wellbeing, such an impact outweighs the detrimental impact that a bar may have on your right to a private life.

You have no cautions or convictions recorded on PNC which might deter an employer or voluntary organisation from recruiting you into regulated activity and there are no other safeguarding measures that we are aware of. Whilst the Metropolitan Police Service have previously chosen to disclose details of their involvement, this decision was at their discretion and it is possible that in the future a similar disclosure may not be made. Inclusion in the Children's and Adults' Barred List therefore appears necessary to prevent future harm.

E. Mr Ogunbiyi's argument

8. Mr Ogunbiyi told us that KCN would not be giving evidence and that his case could be dealt with on submissions. He criticised the reasoning in DBS's letter. The judge drew his attention to the **Barring Decision Summary**, in particular at pages 67-70, which contained a fuller explanation. Mr Ogunbiyi checked his papers and said that he had seen it.

9. Mr Ogunbiyi pointed out that SU's absence from the trial was not significant. The Crown Prosecution Service had allowed the case to proceed to trial and the judge had allowed the case to go to the jury. The jury had tested the evidence, including evidence from KCN, to the highest standard and found him not guilty. DBS, he argued, had treated the significance of the trial and the verdict as illusory. There was no further factual evidence before the tribunal and no cogent reasons for differing from the jury. No evidence had been excluded from the jury's consideration. DBS was relitigating the issue without the safeguards of a trial. There was no evidence to support DBS's reasoning. He accepted that the civil standard of proof was not the same as the criminal, but asked what was the difference in this case. He concluded by arguing that inclusion in a barred list was protective, not punitive. Protection was based on risk. KCN had worked in care since 2007 and there was no other record of any complaint about his behaviour. The only basis for identifying any risk was the report of SU, which KCN denied.

F. Why we do not accept Mr Ogunbiyi's argument

10. We accept much of what Mr Ogunbiyi said. The Crown Prosecution Service had allowed the case to proceed to trial and the judge had allowed the case to go to the jury. KCN gave evidence and no evidence was excluded from the jury. The jury tested the evidence to the criminal standard and found KCN not guilty. And we accept that we have no evidence that was not before the jury.

11. We do not, though, accept that SU's absence was irrelevant. She had said she would attend court and give evidence. We simply do not know whether or not her evidence would have produced a different outcome. Her absence was not a decisive factor in DBS's reasoning. It was, though, a relevant factor and DBS was entitled to take it into account.

12. Nor do we accept that DBS has rendered the trial and the jury's verdict illusory. DBS accepted the verdict, as we do, but it was entitled to assess the evidence to the civil standard on the balance of probabilities. There is a difference between the two standards. It is not just a matter of words, not even in the circumstances of this case.

The standards reflect a difference in the degree of certainty that KCN did what SU alleged. DBS was not relitigating the same issue as the criminal trial. It was litigating a different issue, albeit an issue that involved the same evidence.

13. We explain below why we have not found a mistake in the facts found by DBS. On that basis, DBS was entitled to identify a risk if KCN were to work with children or vulnerable adults in regulated activity. Mr Ogunbiyi did not present a proportionality argument on that basis and we consider he was right to do so.

G. Why KCN has not proved that DBS made a mistake of fact

14. Out of fairness for KCN, we now deal with the ground on which Judge Jacobs gave permission to appeal. The burden of showing a mistake rests on KCN. See the Presidential Panel in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC) at [8]. He has not discharged that burden.

15. In granting permission to appeal, Judge Jacobs referred to the decision of the Court of Appeal in *RI v Disclosure and Barring Service* [2024] 1 WLR 4033 and the Upper Tribunal's power to make its own assessment of the evidence. That case dealt with the possibility that an appellant might give evidence to the Upper Tribunal, even in the form of a denial of the allegations, and submit to cross-examination. We accept that KCN has denied the allegations throughout. We have not, though, heard him give evidence. So, we have not had the chance to see how he responded to cross-examination by Ms Hartley or how he answered questions from the panel. We do not hold KCN's decision not to give evidence against him. He had the benefit of advice from counsel and we do not know what that advice was. His decision has, though, deprived us of any advantage there might have been from his evidence, including his chance to deal with our concerns.

16. For convenience we base our summary of the evidence largely on DBS's **Barring Decision Summary**.

17. SU was an adult female, aged 46, with mental health issues. She lived in supported living accommodation and called her support worker for help after threatening suicide by drinking bleach. KCN and a female support worker came to her residence, but she declined to engage with them. The female support worker left, leaving KCN with the female as she thought SU might be more forthcoming with him. The support worker said that KCN returned to the office approximately 5 minutes after her.

18. SU alleged that KCN asked her to sit next to him on the sofa and then hugged her, touched her leg, kissed her, touched her breasts, masturbated and put his penis into her mouth, instructing her to 'suck it'. She said that KCN ejaculated into his hand, then washed his hands with bleach, and made her rinse her mouth with mouthwash before leaving the premises. SU accepted that she had responded to his kiss.

19. SU reported the incident to a supervisor almost immediately. The supervisor called the police. KCN was arrested and interviewed by the police. He said that SU joined him on the sofa unprompted, put her head on his shoulder and her hand on his lap. He removed her hand and stood up, but SU also stood up and tried to grab him. He then used her toilet due to having diabetes and drinking lots of water. He moved a bottle of mouthwash to one side to reach the hand soap and then picked up a bottle of

bleach from the floor, showed it to the female and said 'please don't use this'. He said he had been in the flat for no more than 5 minutes.

20. When KCN returned to the office, he made a note. He said at his trial that he did so because that was standard practice and he was 'worried knowing the kind of person she is'. He also said that the note was not complete, because he had not expected matters to end up in court. His shift had finished and he wanted to get home.

21. KCN was released pending further investigation which included scientific examination of the outside surface of the cap and main body of a bleach bottle taken from SU's residence. Semen was found on both areas, and a combined sample was prepared for DNA profiling. A complete major DNA profile was obtained that matched the reference DNA profile of KCN. The crime report suggests that KCN's semen was also found on the toilet, his boxer shorts, the mouthwash bottle and on the sink as he provided an explanation for this during a second interview.

22. During the second police interview KCN continued to deny the allegation. He said that when he had urinated he squeezed the end of his penis and that any semen found must have been accidental and transferred from his person or clothing after he urinated. His boxer shorts were clean on that morning, but his jeans were not. He also said that SU had a history of making false accusations. Although SU had a history of hallucinations and making accusations, none had previously been directed at any particular individual.

23. With one reservation, we accept Ms Hartley's structured analysis of the evidence, which is set out in full at pages 140-142.

- SU's account was detailed and credible.
- She had complained immediately.
- Her account was consistent with the distribution of KCN's DNA. KCN's explanation is inherently implausible.
- There is no evidence that SU had any animosity towards KCN.
- KCN has no sensible explanation for not making a full record when he returned to the office.
- SU accepted that she had responded to KCN's kiss and not been passive throughout.
- SU corrected a police officer who inaccurately stated what SU had said.

We mentioned one reservation. We do not accept that KCN was banking on SU not being believed if she reported him.

24. We have also taken into account that: (a) KCN remained alone with a female, despite this not being the correct practice; and (b) that he left the bleach with her, despite her threat to drink it.

25. Mr Ogunbiyi emphasised that there was no record of any incidents involving KCN since he started work in the care sector in 2007. We accept that KCN says that there were no incidents. We do not have the usual records that are often produced by agencies or employers, which would be provide some corroboration for what he says. Not do we have any references. We have, therefore, assessed the evidence on the basis that this was an isolated incident.

26. DBS relied on SU's account. We find no fault with DBS's analysis of the evidence or its finding on the balance of probabilities. We largely accept Ms Hartley's analysis

of the evidence to the same effect. If we were considering the evidence afresh, we would have come to the same conclusion as DBS.

**Authorised for issue
on 05 February 2026**

**Edward Jacobs
Upper Tribunal Judge**

**Elizabeth Bainbridge
Roger Graham
Members**