Neutral Citation Number: [2026] UKUT 159 (AAC)

Appeal no. UA-2021-001206-V

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

MK

Appellant

-v-

Disclosure and Barring Service (DBS)

Respondent

Before:	**Upper Tribunal Judge Mitchell**
	Upper Tribunal Member Hutchinson
	Upper Tribunal Member Turner
Hearing:	appeal decided without holding a hearing

Representation (written submissions):

Appellant*:*	in person
Respondent:	Richard Evans, of counsel, instructed by DBS Legal Department
On appeal from:	
Decision maker:	Disclosure and Barring Service (DBS)
DBS ref:	00932190884
Date of decision:	8 March 2021

<u>SUMMARY OF DECISION</u>

65. Safeguarding Vulnerable Groups
65.10. Safeguarding Vulnerable Groups – fairness of DBS decision making

Judicial summary
DBS' barring decisions were not flawed by reason of a failure to provide a further opportunity to provide supporting medical evidence that might demonstrate improved mental health.

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 Upper Tribunal panel follow.

DECISION

The decision of the Upper Tribunal is to DISMISS this appeal. DBS did not make an error of law, or mistake of fact, within section 4(2) of the Safeguarding Vulnerable Groups Act 2006. DBS' decision of 8 March 2021 is CONFIRMED.

ORDER

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) MK, who is the Appellant in these proceedings;

(b) any member of MK's family;

or any information that would be likely to lead to the identification of any of them 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.

REASONS FOR DECISION

Introduction

1. In these reasons:

- "2006 Act" means the Safeguarding Vulnerable Groups Act 2006;
- "DBS" means Disclosure and Barring Service;
- "MK" means the Appellant

Factual background

The incidents that led to MK's barring

2. Police records dated 21 July 2016 provided information about incidents involving MK, who was referred to as the 'suspect', and her younger brother. The incidents took place when MK was aged 16 and her brother 5:

> "Police were called to the location by social services…they were called by one of the Suspect's therapists and were told that the Suspect had stated that she had tried to drown her brother and that she really wants to hurt him that she likes when he is in pain.
>
> …Suspect stated that she had tried to drown her little brother…in the bath…he stated that his sister the Suspect came into the bathroom on Tuesday and told him to turn over so his face was facing the water in the bath and she then began to push and pull his face in and out of the water…
>
> …also stated…that the Suspect had put a pillow over his face before but couldn't give a date or time…also stated…that some time last week the Suspect had put her hands around his neck and squeezed…
>
> …mum…stated…that she was downstairs when the incident was occurring and heard screaming and crying, she went upstairs and saw the Suspect holding on to [brother] whilst he was in the bath…
>
> …the Suspect has mental health issues, which includes social anxiety which is treated with medication called SERTRALINE 100 mg per day…the Suspect is a self harmer and has tried to hang herself in the past and cuts herself…the Suspect is very high risk in regards to suicide…has a diagnosis of ASD. She is currently open to CAMHS for depression, chronic bulimia and social interaction problems".

3. A police record dated 22 July 2016 set out MK's mental health history as described by her parents. She had been depressed since January of that year but had not identified why. A doctor from 'Talking Therapy' thought something had happened to MK that she had not disclosed. MK's mother thought she had had an eating disorder since she was 9 years old and that she harmed herself every day. In June 2016, MK tried to commit suicide for the second time. Social services became involved. Both suicide attempts involved overdoses of paracetamol and led to hospital admission. MK's mother thought MK started hurting her brother 2-3 weeks before the bath incident.

MK told her mother that she could not stop herself hurting her younger brother, but she would commit suicide if she did hurt him.

4. A non-verbatim record of MK's police interview under caution on 22 July 2016 stated that she understood she was being interviewed because she had hurt her younger brother by trying to drown, strangle and suffocate him. MK said she had attempted to strangle her brother "a few times" within the past month.

5. MK's family did not want her to be charged with any criminal offence, and the police decided to take no further action.

6. The documentary evidence before DBS about MK's medical treatment and progress following the above incidents included:

(a) *22 July 2016*: MK was provided with local authority accommodation as a 'looked after child' under the Children Act 1989. An assessment plan recorded MK's disclosure of sexual assault by several men, expressed concern that she used "maladaptive systems as coping mechanisms" and "would benefit from support in developing more appropriate and safe coping mechanisms";

(b) *1 September 2016*: concerns raised about MK misusing alcohol at her local authority placement;

(c) *6 October 2016*: local authority officials decided that MK required a different placement; her current placement was unsuitable, and she required a more therapeutic environment;

(d) *15-17 November 2016*: MK attempted to jump out of a car after a CAMHS assessment, and also out of a window at her local authority placement. It was considered that MK ought to be cared for in a hospital environment;

(e) 17 November 2016: MK was compulsorily admitted to hospital under section 2 of the Mental Health Act 1983 (detention for assessment);

(f) 15 December 2016: the legal basis for MK's detention was altered to section 3 of the 1983 Act (detention for treatment). She was given a working diagnosis of bipolar disorder and, subsequently, diagnosed with schizo-affective disorder;

(g) 12 July 2017: MK was discharged from hospital and went to live with her aunt. The discharge plan provided for MK to be given mental health medication by injection every two weeks;

(h) 21 July 2017: MK enrolled at college to pursue a Level 1 Health and Social Care course. Case notes said that she “may be having unrealistic expectations of what she is capable of doing but is still in recovery”;

(i) 4 September 2017: doctor’s note, “things seem stable from mental health point of view but for low moods due to not going out and spending too much time on bed”;

(j) 8 September 2017: MK’s college attendance was temporarily suspended pending a meeting of a health and well-being panel.

7. The papers provided to the Upper Tribunal by the DBS do not contain any evidence about MK’s subsequent therapeutic input and its effects.

DBS’ decision making

8. The DBS invited MK to make representations on their proposal to include her on the list of persons barred from working with children and the list of persons barred from working with vulnerable adults. On 31 December 2020, MK provided the following written representations:

> “…In 2016, I was 16 years old and I was extremely sick mentally. I was diagnosed with schizo affective disorder, eating disorders and ptsd. I was having psychotic episodes and during that time I found myself harming my younger brother. I have no memory of it and wasn’t charged in the end. I would like to add that I am now in a really good place and haven’t had a psychotic episode for three years. If there’s any evidence needed on my current health to prove there’s no risk at all, I can provide that if needed. I don’t think I need to be put on the barring list because of this.”

9. The DBS responded to MK’s representations on 11 January 2021. Their letter included the following:

> “…you state that you can provide evidence of your current mental health. If held, please provide the DBS copies of any documents detailing that you

have/are addressing your mental health. This includes any reports/assessments completed by mental health/health care professionals.

10. In reply, MK provided a letter dated 21 January 2021 written by her 'care co-ordinator / lead professional', Ms M. MK's covering email included the statement "this dbs application was for a nursing course at Kingston university, which is what my care coordinator is talking about in the letter". Ms M's letter itself read as follows:

> "I am writing in support of [MK] proceeding with her university placements. Whilst she has a history of offenses, these are in the contact [*sic*] of historical psychotic symptoms, PTSD and mood instability. She has had a forensic opinion from Dr [SJ] to this effect. [MK] is now receiving psychological support for her mental health problems and is managing to maintain relatively stable mental health. Mental health services would continue to be in regular contact with Kingston University student support services should there be any concerns about relapse."

11. We observe that this letter: (a) states that MK has a history of 'offenses' but none of the documentary evidence provided to the Upper Tribunal by DBS indicates that MK has ever been convicted of, or cautioned in respect of, any criminal offence; (b) the writer's express purpose was to support MK's intended pursuit of a nursing course, rather than to assist in trying to persuade DBS that she should not be barred from working with all children and vulnerable adults.

12. DBS' decision letter of 8 March 2021 (page 8) included the following findings relating to the risks posed by MK towards children and vulnerable adults:

(a) "you made admissions [to your therapist] that you wanted to harm the victim, and admitted you liked it when they were in pain";

(b) after noting that MK "subsequently stated you felt guilty and horrible afterwards", the DBS found "you were suffering from significant mental health [sic] at the time of this incident";

(c) "whilst the DBS acknowledge that your mental health played a significant role in your harmful behaviour, this does not lessen the safeguarding concerns raised";

(d) “it is of further concern to the DBS that you stated you felt compelled to inflict pain, and disclosed to a psychologist that you ‘hated young kids’ and ‘want them all killed…you have made admissions to wanting to harm vulnerable groups, and concerns are raised this could transfer into regulated activity”;

(e) “your actions only appeared to cease following intervention from your own mother, and subsequent police and mental health service intervention. Without this the DBS cannot be assured that your actions could not have escalated further – and that you would not have tried to significantly harm your young brother again”;

(f) “if you were again to suffer with your mental health, and if your mental health were to become unstable in the future – there is a significant risk that your behaviour could be repeated, which has the potential for significant harm”;

(g) “it is acknowledged that this behaviour occurred in July 2016, and there is no information to indicate that you have harmed others since this date. It is however noted that you state within representations that you have not had another episode for three years. This supports that your mental health is not isolated to this one specific incident, but is a continual potential issue”;

(h) “Ms [M] confirms that you are receiving psychological and medical support, and you are maintaining stable mental health. Whilst this is a positive, the DBS have concerns that your mental health could relapse in the future…that mental health services would be in regular contact with the University should there be concerns about a relapse suggest that there is a possibility of such an event in the future”;

(i) “the DBS acknowledge that you appear to have stable mental health at this time, however the potential for harm if your mental health deteriorated in the future is too serious to ignore”. DBS’ broader analysis, contained in their barring process document (page 96) further stated that “passage of time alone however is not seen to be a sufficient safeguarding measure…at this time the DBS have no information to highlight [MK’s] current mental state…the DBS does not know how well [MK] has engaged with mental health practitioners, and whether she has been able to address these thoughts and behaviours”;

(j) “it is…assessed that your behaviour, and your aggression when suffering with your mental health could transfer towards a vulnerable adult in your care. You previously disclosed that you targeted your younger brother due to his vulnerability, and his

innocence. A vulnerable adult…in your care would have similar levels of vulnerability. The DBS therefore assess that you do pose a risk to vulnerable adults, and concerns are raised that you could harm an adult in your care if you were to suffer a relapse".

13. DBS' decision letter also addressed the impact of their decision on MK, finding that barring would "significantly impact upon your human rights". DBS acknowledged that barring would prevent MK from working as a Mental Health Support Worker in the future, prevent her from engaging in the 'role' of pursuing a nursing course, and that there was a stigma attached to being barred. DBS went on to state that "information in respect of your behaviour would be available on future disclosures" (presumably, the DBS meant under enhanced disclosure arrangements) but this would not be a sufficient safeguarding measure because "the DBS cannot be assured prospective employers would see the full context of your behaviour".

Legal framework

Right of appeal

14. The right of appeal against DBS' decision to include a person in a barred list, provided for by section 4(2) of the 2006 Act, is as follows:

> "(2) An appeal…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…was based."

15. On an appeal against a barring decision, it is for the appellant to demonstrate a mistake of fact or law: see *PF v DBS* [2020] UKUT 256 (AAC), at [49]. A mistake of fact is not established simply because the Upper Tribunal thinks that it would have made different findings of fact than those made by DBS (*PF* at [38]). Unless and until the Upper Tribunal finds a mistake of fact or law, it is "not free to make its own assessment of the written evidence" (*Disclosure and Barring Service v JHB* [2023] EWCA Civ 982, at [90]).

16. A mistake of fact means a finding of fact that is 'wrong' (*PF* at [38]). A finding may be wrong even if there is some evidence to support it, or it is not irrational (*JHB* at [95]). A finding may also be 'wrong' where the Upper Tribunal has heard evidence not before DBS, which shows that DBS' finding was wrong (*JHB* at [95]). While a value judgement is not a finding of fact, the dividing line between the two can be difficult to draw (*Disclosure and Barring Service v AB* [2021] EWCA Civ 1575 at [55]).

17. Section 4(3) of the 2006 Act provides that "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". In other words, there is no right of appeal against DBS' decision that it is appropriate for an individual to be included in a barred list. The Act's barring criteria do not mention 'risk' but the level of risk posed to children or vulnerable adults is clearly something that DBS will consider relevant when determining if it is appropriate to include a person in a barred list. In *AB*, the Court of Appeal held:

> "43…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 with children or vulnerable adults, is a matter for the DBS."

18. The required standard for reasons for a barring decision was addressed in *Khakh v Independent Safeguarding Authority* [2012] EWCA Civ 1341:

> '23…. I would accept that the ISA [now DBS] must give sufficient reasons properly to enable the individual to pursue the right of appeal. This means that it must notify the barred person of the basic findings of fact on which its decision is based, and a short recitation of the reasons why it chose to maintain the person on the list notwithstanding the representations. But the ISA is not a court of law. It does not have to engage with every issue raised by the applicant; it is enough that intelligible reasons are stated sufficient to enable the applicant to know why his representations were to no avail.'

<u>Barring criteria</u>

19. Part 1 of Schedule 3 to the 2006 Act sets out criteria for including a person in the children's barred list. Paragraph 3 of the Schedule provides as follows:

> "(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…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."

20. The 2006 Act's definition of "relevant conduct" includes "conduct which endangers a child or is likely to endanger a child" (paragraph 4(1)(a) of Schedule 3 to the 2006 Act).

21. The barring criteria for the vulnerable adults barred list, provided for in Part 2 of Schedule 3, are similar to the children's barring criteria. For the purposes of the vulnerable adults barred list, "relevant conduct" includes "conduct which, if repeated

against or in relation to a vulnerable adult, would endanger that adult or be likely to endanger him" (paragraph 10(1)(b)).

Grounds of appeal

22. The Upper Tribunal's grant of permission to appeal against DBS' barring decisions read as follows:

> "19. [MK's] grounds of appeal largely argue that the DBS failed to take into account certain information, such as her psychosis being linked to a 'toxic household' and that she was encouraged to work with vulnerable people by her own psychiatry team. However, these are matters to which the DBS' attention was not drawn and do not show that the DBS arguably erred in law. In the absence of supporting evidence, I am also unable to find that the DBS arguably erred in fact.
>
> 20. [MK] also argues, in general terms, that the DBS' risk assessment was inconsistent with her improved mental health and the absence of any recent harmful behaviour. Again, these are topics about which no, or very little, supporting evidence was brought to the DBS' attention. However, there is an underlying issue connected to [MK's] arguments namely the almost complete absence of any medical evidence about [MK's] medical treatment and recovery after the 2016 incident and her compulsory admission to hospital. [MK] did supply a supporting letter from her care co-ordinator, but it seems to me that the care co-ordinator, for whatever reason, thought she was being asked to offer a view on [MK's] suitability to commence a course of study in nursing. The absence of recent medical evidence was noted by the DBS in their reasons for their decision. For instance, the barring process document noted that the DBS had no information about [MK's] current mental state, nor did they know anything about how well she had engaged with therapeutic help and whether she had addressed the 'thoughts and behaviours' that lay behind the 2016 incident.
>
> 21. It might be said that [MK] only had herself to blame for the lack of recent medical evidence / relevant evidence about the risks she might pose to children and vulnerable adults. She was invited to provide evidence about her current mental health but, in response, supplied a letter from her care co-ordinator about her suitability to pursue a nursing course. However, the DBS must have known that they were dealing with a young person (a) who had a fairly recent history of severe mental illness – I think it may be taken as read that minors are not sectioned under the Mental Health Act 1983 unless their mental state is very poor; (b) whose medical records must have contained extensive information

about her mental state, her therapeutic engagement and the level of risk that she might pose; (c) who may well have misunderstood the DBS' request for evidence about her current mental health given that her response was to supply a supporting letter about her suitability to pursue a nursing course; (d) whose chances of pursuing a career in her chosen field would be curtailed by her inclusion on a barred list; and (e) whose rehabilitation plans may have been linked to her achieving her goal of becoming a mental health support worker.

22. In the circumstances just described, arguably it was unfair, and an error of law, for the DBS to proceed to make barring decisions without providing [MK] with a further opportunity to provide medical evidence. Arguably, such further opportunity was also necessary in order for the DBS to demonstrate that barring was a proportionate response in [MK's] case. [MK] had been compulsory admitted to hospital and, upon discharge, was provided with statutory aftercare services under section 117 of the Mental Health Act 1983. The mention of depot medication in the community also raises the possibility that she was discharged under a community treatment order. As a person discharged from compulsory hospital admission, MK may must also have been supported in the community under the Care Programme Approach arrangements (or a similar intensive support arrangement). My point is that all of these interventions are inevitably associated with a good deal of assessment, care planning and other therapeutically relevant documentation which should be located in [MK's] medical records. Arguably, the DBS, in order to deal fairly with [MK] and demonstrate the proportionality of any barring decision, should have asked her to consent to the disclosure of her medical records. This may well have filled the evidential vacuum in this case and allowed the DBS to analyse risk on a properly informed basis rather than take the approach that was arguably taken of assuming that, in the absence of relevant therapeutic evidence, [MK] had to be treated as posing an ongoing risk. I grant [MK] permission to appeal on the ground described in this paragraph."

23. We note that the Upper Tribunal's permission determination also included the following recommendation:

"It would assist [MK] if she were able to obtain legal assistance for her appeal. While I note that she was unable to find legal representation before the listed permission hearing, she may wish to consider contacting MIND's Legal Line. MIND may not be able to provide representation, but they may be able to direct her to an organisation that can. Her chances of obtaining representation may

> be improved by the fact that I have granted her permission to appeal to the Upper Tribunal. The telephone number for MIND's legal line is 0300 466 6463."

Arguments

Appellant

24. DBS provided a written response to MK's appeal on 24 November 2022. MK applied for a number of extensions of time in which to reply to DBS' response (case management directions had required a reply within one month of DBS' response). The final extension of time granted to MK expired on 11 December 2023 but without MK's written reply having been received at the Upper Tribunal.

25. MK's out-of-time written reply was received on 28 August 2024. She wrote that her reply was delayed given the "exceptionally distressing" circumstances of her appeal "particularly in light of my history of mental health challenges".

26. MK argues that the incident with her younger brother occurred when she was struggling to cope with an abusive and controlling home environment and "acted out of sheer desperation". Her actions were never intended to cause harm but were "a desperate plea for assistance, borne out of my overwhelming desire to escape a harmful situation".

27. MK states that she has made considerable progress in rebuilding her mental health, and severed all contact with her father "which has allowed me to establish a safe and stable environment". She now has a close relationship with her younger brother who frequently stays with her during school holidays, and "this bond with my brother reflects the significant improvements I have made in my personal life and my ability to maintain healthy, supportive relationships".

28. MK also describes the implications of DBS' barring decisions, and states that barring prevents her from pursuing her aspirations and contributing positively to society. If given the opportunity, she believes that she can lead a productive and fulfilling life.

29. MK's written reply ends with an explanation of her failure to supply additional supporting evidence:

> "Throughout this process, I have sought advice from various professionals, but I have found it incredibly difficult to discuss this situation due to the immense shame and embarrassment attached to it. I have also been advised that it does not matter what the truth is, but rather that I should say what the judge wants to hear. However, I find it impossible to go on like that. I want to be able to tell my story truthfully, so it can be understood for what it is. I believe that only by being

> honest about what truly happened can I hope to move forward from this and I know I have nothing to lose."

30. The Upper Tribunal gave case management directions which allowed DBS two weeks to object to the tribunal extending time and admitting MK's late written reply. The directions went on as follows:

> "3. The protracted history of these proceedings is a concern. The Upper Tribunal must be confident that the Appellant is able and willing to conduct her case in a timely fashion. I therefore direct that, within **two weeks** of the date on which these directions are issued, the Upper Tribunal must receive her written confirmation as to whether she wishes her appeal to be decided (a) at a hearing or (b) on the papers.
>
> **4. Under rule 8(3)(a) of the Upper Tribunal Rules 2008, the Appellant is warned that, if she fails to comply with direction (3) above, the proceedings on her appeal may be struck out in their entirety."**

31. In reply, MK informed the Upper Tribunal that she did wish to continue her appeal but was content for it to be decided on the papers. The Upper Tribunal then gave directions providing both parties with the opportunity to supply final written submissions. DBS provided written submissions but the Appellant did not, although DBS' submissions were not materially different to their earlier submissions.

DBS

32. DBS submit that their barring decisions were neither irrational nor procedurally unfair. DBS followed its standard decision-making procedure, which included the issue of a 'minded to bar' letter which identified proposed grounds for barring and invited MK to provide further supporting evidence which included an express reference to 'any reports from medical experts'. MK made representations against barring but did not take the opportunity to provide further medical evidence.

33. DBS argue that it was not their responsibility to make out MK's case for her, nor undertake additional enquiries. DBS do not have investigatory powers akin to those possessed by, for example, the police. In any event, it has always been open to MK, since she was barred, to supply additional medical evidence and request a review of her inclusion on the barred lists. MK could also supply medical evidence for the purposes of these proceedings before the Upper Tribunal.

Analysis

34. Despite the time that has elapsed since the Appellant was granted permission to appeal, she has not provided any additional evidence despite the terms on which the Appellant was granted permission to appeal which drew attention to the absence of medical evidence in support of the Appellant's argument that her mental health had improved. We are satisfied that the Appellant appreciated this because her written submissions explain why she has not supplied supporting medical evidence. It follows that we find that it the Appellant cannot produce, and could not have produced, medical evidence to support her argument that, since the 2016 incidents, her mental health had improved such as to call into question the reliability of the findings made by DBS when making their barring decisions.

35. The Appellant was granted permission to appeal on the ground that DBS arguably acted unfairly in failing to give her a further opportunity to provide supporting medical evidence. However, even if such a further opportunity had been given, it would have made no difference. No additional medical evidence would have been supplied, and DBS would have made the same barring decisions. In those circumstances, we are not persuaded that DBS made an error of law or mistake of fact, within section 4(2) of the 2006 Act, and we dismiss this appeal.

Authorised for issue by Upper Tribunal Judge Mitchell on 4 April 2026

Section 4(6) of the Safeguarding Vulnerable Groups Act 2006