



**THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: UA-2023-000448-V  
[2024] UKUT 227 (AAC)  
SJS V DISCLOSURE AND BARRING SERVICE**

**THE UPPER TRIBUNAL ORDERS that:**

**No one shall, without the consent of the Upper Tribunal, publish or reveal the name or address of any of the following:**

- (a) SJS, who is the Appellant in these proceedings;**
- (b) any other person mentioned in the documents or during a 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 following an oral hearing on 22 July 2024

**Representatives**

Appellant	Chloe Hucker of counsel, instructed by Blackfords LLP
Disclosure and Barring Service	Simon Lewis of counsel, instructed by DLA Piper UK LLP

**DECISION OF THE UPPER TRIBUNAL**

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

DBS Reference: 00971517892  
Decision letter: 5 December 2022

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

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

remits the matter to DBS for a new decision in the light of the reference for the appellant from TR project of 10 May 2022; and

directs that the appellant remain in the lists until DBS makes its new decision.

## **REASONS FOR DECISION**

### **A. History and background**

1. On 5 December 2022, DBS decided to include SJS in the children's barred list on these findings of fact on relevant conduct:

- On 17/11/2021 you slept on duty and left your car keys unattended, resulting in DS, a 16 year old child in your care, absconding in your vehicle.
- On 17/11/2021 you failed to report that DS had absconded, and went on to lie about the incident over the following days.
- Whilst working at TR youth project in 2020, you made a number of inappropriate comments in the presence of children referring to masturbation, resulting in a final written warning.

The letter went on to explain why it was appropriate to include SJS in the barred list, including why that was proportionate to the interference with SJS's Convention right to a private life.

2. It was agreed that the date in the first two findings was wrong. The correct date was 17 October 2021. We refer to the first two findings as 'the van incident' and the third finding as the 'inappropriate language incident'.

3. Upper Tribunal Judge Jacobs gave SJS permission to appeal to the Upper Tribunal on the grounds in Ms Hucker's submissions of 30 November 2023 and 15 March 2024 (pages 417-434). The judge directed an oral hearing of the appeal, which took place before the judge and specialist members on 22 July 2024.

### **B. The legislation**

*The barring provisions*

4. These are the provisions of Schedule 3 SVGA relating to children.

*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.

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- (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.

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

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

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

*The appeal provisions*

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

**4 Appeals**

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

...

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

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

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

(a) on any point of law;

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

(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.

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

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

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

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

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

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

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- (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.

...

**C. The inappropriate language incident**

6. SJS has worked for at least four different organisations over the past decade. For most, if not all, he was doing so on a self-employed basis. We are only concerned with two. The inappropriate language incident took place at TR youth project in 2020. He worked there from June 2014 to June 2022.

7. DBS's finding on relevant conduct relates only to references to masturbation. He had said to youths at the project: 'if you shake [your penis] more than 10 times [after urinating] you are playing with yourself.' DBS's reasoning on appropriateness also referred to other comments about co-workers. For example, he had asked one of the youths if he had 'tasted Auntie G and [said] that he should have a taste of Auntie G'.

8. When Mr Lewis put the masturbation comment to SJS, his response was that this was not sexual and was something his father used to say. When asked about tasting Auntie G, he said this was a reference to her baking. However, Ms Hucker's grounds of appeal did not deny that SJS had made the remarks alleged and we proceed on that basis.

9. Just for completeness, if SJS did intend to deny that there was a sexual element in his comments, we reject that. With perhaps an occasional exception, the comments, individually and collectively, involved sexual references.

10. SJS received a final written warning for making those and other comments. It was to remain active on his file until 17 November 2021 (page 129). That is important, because it was still in force when the van incident occurred. TR project did not dismiss SJS. Indeed, Ms Hucker draw attention to the comment from TR (page 129):

As I expressed to you at our meeting today, I would reiterate that you are, and remain, a valued member of TR team and I very much hope we can now look forward to re-opening the project and moving on in a more positive and productive matter, ensuring that we all work together to provide the best service possible to the children ...

11. Mr Lewis drew attention to the standards expected of SJS as set out in his written warning (pages 97-98). The first three relate specifically to the language he used. The others are more general and relevant to the van incident:

- iv. To interact with both young people and staff on a mature level;
- v. To understand the relevant boundaries that should be maintained when engaging in conversation with young people and colleagues.

The letter ended with a warning:

You should be clear that these are serious matters and consequently your future conduct will be carefully monitored to ensure that you have taken this opportunity to learn and grow from your past mistakes.

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...

Further misconduct during the timeframe specified is likely to result in a disciplinary hearing, which may lead to your dismissal.

12. SJS told us that he had not told other employers of the written warning, because he was self-employed and not required to do so. he received training and was not subject to any further complaints while working for TR project. He remained with them until June 2022.

**D. The van incident**

13. At the time of the van incident, SJS was one of the carers providing support for independent living at a large farmhouse. DS, the only resident, was 16 years old. He had left his previous placement after assaulting a support worker. He attended 'college', although this was in fact a personal tutor, and had a work placement at a local garage. He was familiar with driving as a result of his work placement; SJS told us that he might have had a provisional driving licence. At first, SJS was assisted by one co-worker; later they were joined by a third. At the time of the incident, DS had constructed what SJS called a man cave on the premises and spent a lot of his time isolating himself there. SJS's role was to support DS in living independently. He was not appointed as a carer or supervisor.

14. On 17 October 2021, SJS drove DS to Tesco in his van. On their return, DS went to his man cave and SJS made himself lunch. He had a headache, so he took some painkillers and settled down. At some point, between 12 noon and 12:30, he fell asleep, with his phone and the keys to his van near by. At 15:00-15:30, he was woken by his phone ringing. When he answered, he heard DS saying that he was coming back. SJS managed to say 'what the fuck', before DS rang off. The call lasted only a matter of seconds. About a quarter of an hour later, DS drove up in SJS's van and went into his cave. SJS went after him and confronted him. DS said he had only gone just down the road. SJS left to cool off. He returned for his keys and to find out what had happened. This time, DS admitted that he had driven to Scotland to see a former carer.

15. SJS told DS that he would have to report what happened. DS apologised, although not sincerely, and begged SJS not to report him, pointing out that SJS would lose his job and threatening to say that he had let him take the van to visit Coventry and elsewhere. Eventually, they agreed a truce (SJS's word). SJS would not report anything for 24 hours. For his part, DS said he would 'try to sort it out' and come clean 'if it gets bad'. To anticipate the rest of the story, DS did not sort it out or come clean.

16. SJS rang his manager, but he did not pick up the calls. SJS did not leave a voicemail; he told us that he didn't leave messages. Apart from that, he made no attempt to report what had happened to anyone in authority and no attempt to obtain advice from anyone about what he should do.

17. At 10:05 on 18 October 2021, DS's former carer rang SJS's manager to report DS's visit on the previous day. She said that DS had arrived at her home alone in a van. At 10:15, the manager spoke to SJS by telephone. SJS said he had driven DS to see his former carer. When he met his manager at 14:15, he said he had allowed DS to drive the van up a private road to the carer's home. He gave a detailed account of then taking the car to Gretna Green before going back and sitting in the passenger seat until DS emerged. Neither statement was true.

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18. On 19 October 2021, SJS sent a detailed account to his manager, admitting what had actually happened.

19. Those are our findings. They are based, barring a quibble or two about precise timings, on what SJS told us. What they fail to convey is SJS's mixture of confusion, anger, and bewilderment at what was happening, not to mention his desperation as he tried to find a way to avoid the consequences for what had happened.

**E. The grounds of appeal – mistake of fact**

20. Ms Hucker argued that DBS made a mistake when finding that:

... even when spoken to and assurances have been offered that you would modify your approach, this has not happened. ...

See pages 2-3 of the decision letter. This statement was made as part of DBS's explanation on appropriateness. It is often difficult to know whether these are findings for the purposes of section 4(2)(b). It is certainly a matter of fact. It was also included among the matters that caused DBS definite concerns. Its definite concerns about emotional factors – relationships, emotional congruence with children (page 400) all relate to SJS's use of language. Its definite concerns about behavioural factors – self management and lifestyle, irresponsible and reckless (pages 402-403) relate to a mixture of SJS's use of language and aspects of the van incident.

21. We accept Ms Hucker's argument that SJS had modified his use of language. He continued to work for TR until June 2022, which indicates that he complied with the terms of the written warning. He was also given a positive reference by the project manager for a post in an outbound organisation on 10 May 2022. The reference was not before DBS when it made its decision.

22. The referee had known SJS for about six or seven months when she wrote this reference:

SJS was involved in an alleged allegation by a previous employee. This was investigated, and the findings was no further action was needed regarding this allegation and this investigation was closed. SJS was given further training to support him professionally. This incident was investigated closed and does not impact his professional ability and his capacity to work with young people SJS is a brilliant member of staff.

SJS has been a massive part of TR over the last 8 years. He will be greatly missed. SJS has had an amazing relationship with young people and can build and maintain relationships easily and the young people share a mutual respect for him. SJS has shown initiative and passion when delivering youth work. He will be a great addition to any team working with young people.

The reference does not sync precisely with the evidence of what had happened at TR. It suggests that no action was taken, when in fact SJS was given a final written warning. Be that as it is may, it was a positive reference and he was appointed to the post he applied for.

**F. The grounds of appeal – mistake of law**

23. Ms Hucker argued that DBS:

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- a. failed to give sufficient weight to positive testimonials and material suggesting that the allegations are out of character;
- b. mistakenly approached the two sets of allegations as a course of conduct, leading to an exaggerated view of the appellant's behaviour and portraying him as someone who has repeatedly, despite warning, acted inappropriately towards children;
- c. failed to sufficiently recognise the steps taken to remediate the concerns raised.

She also argued that DBS's decision was disproportionate.

24. It is not for us to decide whether we would have included SJS in the barred list and considered that it was proportionate to do so. Ours is the more limited task of deciding whether DBS made a mistake of law in making those decisions.

25. It is convenient to take grounds (a) to (c) first and together. We have found that DBS made a mistake of fact in not being aware that SJS had remedied his use of inappropriate language. But his choice of language was the manifestation of more fundamental problems. TR project perceptively identified underlying causes when setting out its expected standards by referring to interacting with young people on a mature level and maintaining relevant boundaries. SJS's conduct in the van incident showed a failure to meet either of those standards.

26. It is surprising that, with SJS's training and experience, he was not sure who to report to when he found that DS was missing or how to contact them. He should at least have sought advice, but his only attempt at contacting anyone consisted of a few unanswered calls to his manager. It may be that it was not his practice to leave voicemails, but the seriousness of what had happened warranted more than a few missed calls.

27. Apart from those few calls, SJS made no attempt to contact anyone in authority, to report what had happened, or to seek advice. He did not even speak to his co-worker who took over at the end of his shift. He was prepared to negotiate with the child he was supporting and to agree a truce. He failed to maintain a professional boundary and ceded authority to DS, allowing himself to be threatened and blackmailed. He was willing to allow time for DS to 'try to sort it out'. SJS did not explain what he thought that might involve. Whatever it was must have involved a cover up to protect both of them, which he was prepared to go along with. And he acted as he did, at least in part, to protect his own position. Having failed to report what had taken place, he then made up a story to fit with the report from the former carer, which he then adjusted with details to fit with her statement that DS arrive alone. It took another 24 hours before he admitted the truth, by which time his attempt at concealing the truth had become unsustainable.

28. The proper course of action did not require any particular training or experience. Common sense and honesty would have been a sufficient guide. We note that he acted as he did despite his years of experience in working with young people, despite all the training he had received, and at a time when the written warning was still in place with TR project. That warning spelt out the standards expected of SJS at TR. His conduct fell short of those standards. Instead, he showed himself capable of dishonesty, open to manipulation, and willing to act in his own interests, colluding with a young person



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when doing so, and condoning at least three criminal offences (taking the van without authority and driving without a licence or insurance). He showed no maturity and failed to maintain boundaries.

29. These are our conclusions on grounds (a) to (c):

- (a) DBS made a mistake of law but only because it was not aware of the reference for SJS provided by TR project.
- (b) DBS did not make a mistake of law by treating the allegations as a single course of conduct, because they were linked by a common failure to interact with young people on a mature level and to maintain professional boundaries.
- (c) DBS did not make a mistake of law by failing to recognise the steps SJS had taken to remediate the concerns, because the van incident showed that he had not understood or addressed the fundamental causes of the concerns.

30. What we have said so far applies equally to proportionality. We have followed the approach to proportionality set out by the Court of Appeal in *B v Independent Safeguarding Authority (Royal College of Nursing intervening)* [2013] 1 WLR 308 at [14]-[24]. The Court adopted this analysis:

four questions generally arise, namely: (a) is the legislative object sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?

31. The aim of protecting children is of sufficient importance to justify limiting SJS's Convention right under Article 8 (question (a)) and barring him from working with children is rationally connected with that aim (question (b)). That leaves two questions: is barring no more than necessary to accomplish that aim and does it strike the right balance? DBS decided that:

Consideration has been given to your Article 8 rights. It is recognised that including you upon the Children's Barred List will prevent you from working, volunteering or seeking employment in regulated activity for children. In particular this will prevent you from seeking employment as a support worker or within the wider care sector, which you have stated yourself is the only field you have experience and qualifications in relation to. It is considered that this will be to your detriment, as it will limit your employment opportunities and may cause you to suffer financial hardship. The rights of children you would come into contact with must also be considered, and they have a right to receive safe and appropriate care and support. The harm caused should this not be provided has potential to be significant. Given the unacceptable risk of future harm posed by your behaviour, and with a lack of any other safeguarding measure it is considered proportionate, appropriate and necessary to include you in the Children's Barred List.

32. That is skeletal reasoning and typical of the reasoning used in DBS decisions. It has to be read in the context of the circumstances of the case. They include in particular the details of the van incident, including SJS's attempts to cover it up and the underlying flaws limiting his capacity to act responsibly when having care of children. We consider that DBS was entitled to identify that he posed an unacceptable

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risk to children and an absence of any other safeguarding measure available to protect them.

**G. Disposal**

33. Given our conclusions so far, we have to decide how to dispose of the appeal. For practical purposes, we have two options. One is to dismiss the appeal on the ground that the mistake was not material. The other option is to remit the case to DBS for a new decision. Given the approach of the Court of Appeal in *Kihembo v Disclosure and Barring Service* [2023] EWCA Civ 1547, we have taken the second option as the more appropriate. We note that the key flaw in DBS's decision was the absence of the reference from TR project. That was relevant to the inappropriate language incident, which was the principal source for DBS's 'definite concerns' in its barring judgment.

**Authorised for issue  
on 01 August 2024**

**Edward Jacobs**  
**Upper Tribunal Judge**  
**Elizabeth Stuart-Cole**  
**Rachael Smith**  
**Members**