IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER **Appeal No. UA-2020-000391-V**

[2024] UKUT 247 (AAC)

On appeal from a decision of the Disclosure and Barring Service

Between:	DL	Appellant
	and	
	The Disclosure and Barring Service	Respondent

Before: Upper Tribunal Judge Brunner KC, John Hutchinson and Suzanna Jacoby

Decided on 12 August 2024 following a hearing on the papers on 19 July 2024

ANONYMITY ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I prohibit the disclosure or publication of—

(a) the appellant's name
(b) any matter likely to lead members of the public to identify that name.

Any breach of the order at paragraph 4 above is liable to be treated as a contempt of court and punished accordingly (see section 25 of the Tribunals, Courts and Enforcement Act 2007).

DECISION

1. The appeal is allowed.

2. DBS made mistakes in the findings of fact on which its decision was based. The Upper Tribunal, pursuant to section 4(6)(a) of Safeguarding Vulnerable Groups Act 2006 ('SVGA'), directs DBS to remove the appellant from the adults' barred list.

REASONS FOR DECISION

A. The decision to include DL in the adults' barred list

1. On 12 August 2020, DBS included DL in the adults' barred list on the basis of this finding of fact: 'On an unspecified date prior to the 23rd September 2019, you borrowed money from JG (a service user in your care), failed to repay £20 and made a further request for a loan of £20.'

2. The letter notifying MSB of the decision stated that the decision had been made 'using our barring powers as defined in Schedule 3, paragraph 9 SVGA'.

B. The appeal to the Upper Tribunal

3. DL lodged an appeal, and submitted helpful representations from Citizens Advice dated 25 February 2021 which pointed out inconsistencies in the evidence relied on by DBS, and other matters. Upper Tribunal Judge Poynter gave permission to appeal to the Upper Tribunal on 12 October 2021. Since then it has taken far too long for this matter to reach a final hearing. There have been various reasons for the delay but it is far from satisfactory for both parties that it has taken years to conclude the matter.

4. In giving leave Judge Poynter wrote:

'I acknowledge that those advising the appellant wish the Upper Tribunal to consider the issue of whether the respondent's decision was proportionate.

However, although I do not limit the grant of permission, I judge that the principal issue is simply who is telling the truth: is it the appellant or is it the vulnerable adult ('VA') whose identity I have ordered not to be disclosed?

I have given permission to appeal because, in my judgment, there is a realistic prospect that the appellant's version of events will be believed following the final hearing of the appeal.

I will not be a member of the panel that makes the final decision and it therefore would not be right to give detailed reasons as to why I have reached that conclusion. However, one factor is that there are evidential inconsistencies on both sides.

It has also been a matter of concern to me that, although the appellant's evidence has been (and will be again) given first-hand and tested under cross-examination, the same cannot be said of the evidence against her. She has not had an opportunity to confront those accusing her or to test their evidence.

The mere fact that VA had capacity at the relevant time does not necessarily mean that her evidence is credible. Every working day people whose capacity is not in

doubt give evidence in courts and tribunals that could not be accepted by any sensible person.'

5. Judge Poynter made further comments about evidence, and made orders for the production of some documentation. Leave to appeal was not restricted. The grounds of appeal are at p4. They cover a number of matters of fact and law. The Court of Appeal has decided in *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982 at [97] that the scope of the appeal is limited to the grant of permission. As we have decided the case on matters of fact, we do not need to consider the matters of law in the grounds.

6. DBS made helpful written submissions on 2 April 2023 (p1678) maintaining DBS's position and drawing attention to some features of material which was not before DBS at the time of the decision. DBS's position remains that there was no mistake of fact or law. We have taken those submissions fully into account.

7. It was anticipated that an oral hearing of the appeal would take place. However, the Appellant was bereaved and felt unable to attend a hearing. DBS was neutral about whether an oral hearing was required. The case was therefore determined on the papers on 19 July 2024 before a judge and specialist members.

8. Both parties were given the opportunity to make further submissions. The Appellant made brief submissions restating her position. DBS did not make further submissions.

C. The legislation

9. There are several ways under Schedule 3 to the 2006 Act in which a person may be included on one or other of the two barred lists. This appeal is concerned with what might be described as discretionary barring, on the basis of "relevant conduct" – in effect their past behaviour.

10. The basis for a "relevant conduct" barring decision is set out in Schedule 3 to the 2006 Act. Paragraphs 9 and 10 of Schedule 3 are as follows:

> (1) This paragraph applies to a person if–
>
> *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.

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.

11. Section 4 SVGA contains the Upper Tribunal's jurisdiction and powers, as follows:

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;

…

(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.

…

12. The routes to appeal are referred to in shorthand as 'mistake of law' and 'mistake of fact'. Sub-section (3) has the effect that deciding whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact and so, in effect, is non-appealable.

D. Mistake of fact

13. The courts and tribunals in a number of cases have explored the ways in which an appellant can establish that DBS has made a mistake of fact.

14. The extent of the jurisdiction for the Upper Tribunal to determine mistakes of fact by the DBS and make its own findings of fact was outlined in PF v Disclosure and Barring Service [2020] UKUT 256 (AAC) at [51]:

'Drawing the various strands together, we conclude as follows:

a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).

b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.

c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.

d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).

e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.

f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.

g) The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to

make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.'

15. It was made explicit in paragraph [42] that it is not a requirement for the UT to hear oral evidence in order to find a mistake of fact:

'One way, but not the only way, to show a mistake is to call further evidence to show that a different finding should have been made. The mistake does not have to have been one on the evidence before the DBS. It is sufficient if the mistake only appears in the light of further evidence or consideration'.

16. In DBS v JHB [2023] EWCA Civ 982 the Court of Appeal (Civil Division) allowed DBS's appeal against a UT decision. The decision included at [90]:

'On the reasoning in PF, the decision of the DBS was therefore the starting point for the UT's consideration of the appeal. JHB did not claim that DBS has erred in law. The UT could not exercise any powers on the appeal, therefore, unless it identified an error of fact in the approach of DBS to the findings of fact on which the Decision was based. Those findings were the conviction for the Offence, which JHB did not challenge, finding 1, which JHB admitted, and findings 2 and 3. Those findings of fact did not include the DBS's assessment of the weight to given [sic] to the reports. The UT was not free to make its own assessment of the written evidence unless and until, it found such an error.'

17. In DBS v RI [2024] EWCA Civ 95, Bean LJ, with whom Males and Lewis LJJ agreed, said—

'28. I agree with the observation that there is no longer any point of legal principle raised by this appeal which requires determination by the court, but I do not accept that the parties are in agreement as to the interpretation and scope of the mistake of fact jurisdiction. Far from it. In their further supplementary skeleton argument on behalf of RI Mr Kemp and Mr Gillie write:-

"The Upper Tribunal is entitled to make a finding that an appellant's denial of wrongdoing is credible, such that it is a mistake of fact to find that she did the impugned act. In so doing, 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. That is different from merely reviewing the evidence that was before the DBS and coming to different conclusions (which is not open to the Upper Tribunal)."

29. That is in my view an accurate description of the mistake of fact jurisdiction and corresponds with the guidance given by the Presidential Panel of the Upper Tribunal in PF, approved by this court in Kihembo.

[…]

31. It seems to me plain that the Presidential Panel in PF were saying that where relevant oral evidence is adduced before the UT in an appeal under s 4(2)(b) of the

2006 Act the Tribunal may view the oral and written evidence as a whole and make its own findings of primary fact. I would add that whether or not A stole money from B cannot be considered a matter of "specialist judgment relating to the risk to the public" engaging the DBS's expertise.

32. Turning to the decision of this court in JHB, Ms Patry prays in aid the observation in [93] that "on the authorities a disagreement in the evaluation of the evidence is not an error of fact". But that must be read in the context of the statement in the previous paragraph that it was a case where the UT was looking at "very substantially the same materials as the DBS". In contrast with the present case, JHB had given very limited oral evidence, which did not have a direct bearing on the decision to place him on the lists (see paragraph [90] of the judgment, cited above).

33. The ratio of JHB is difficult to discern, partly because this court found that the UT had erred in several respects any one of which might well have vitiated the decision. I venture to suggest that it may be authority for the proposition that if the UT has exactly the same material before it as was before the DBS, then the tribunal should not overturn the findings of the DBS unless they were irrational or there was simply no evidence to justify the decision. The same rule may apply where, as in the JHB case itself, oral evidence is given but not on matters relevant to the decision to place the appellant on one or both of the Barred Lists.'

18. We have applied the law as set out in the legislation and cases above. Although in this case the Upper Tribunal did not hear oral evidence, this is not a case where the Upper Tribunal has exactly the same material before it as was before the DBS. It is open to the Upper Tribunal to consider all of the evidence before it, which includes significant material which DBS did not have, to determine whether there was a mistake of fact. We note that a finding as to whether or not the appellant borrowed money did not engage any specialist expertise of DBS and so we do not defer to DBS.

E. Analysis of Evidence: general

19. DL worked at a care home ('the home') with a number of service users who were vulnerable adults. Almost all of the evidence relied on by DBS was gathered in the course of an internal investigation at DL's workplace where JG was a resident. The investigation was triggered by an apparent disclosure by JG to her hairdresser on 23 September 2019. The hairdresser contacted a previous manager of the home who no longer worked there, who was called DB. The issue was brought to the attention of the home, which initiated an internal investigation. That investigation concluded that there was sufficient material for DL to be questioned at a disciplinary hearing, the investigation having concluded with a 'reasonable belief' that JG had given the correct version of events, and that DL had borrowed money, failed to pay all of it back, and asked to borrow more. DL declined to attend a disciplinary hearing and resigned.

20. Without exception, the documentation created in the course of that internal investigation is extremely weak evidence for a number of reasons. Many of the documents do not have headings, meaning that it is unclear what they are, whether notes or text from an email or a letter. Many documents are not dated. Many accounts seem to have been recorded days or weeks after conversations which they describe. Accounts are very short and lacking in detail. There were various inconsistencies between accounts. The investigation raised matters which plainly could and should have been investigated further, but were not. Overall it was a superficial and cursory investigation.

21. We have analysed in some detail all of the material before us. We note, and give weight to the fact that JG was concerned enough to confide in her hairdresser. We note, and give weight to the fact that JG was broadly consistent in the core of her assertion that DL had borrowed money, not paid some back and asked to borrow more. We divide our assessment of the evidence into documents relating to JG's account, and documents relating to DL's account. We have allocated numbers to documents to assist cross-referencing.

F. Documents gathered in the investigation relating to JG's account

Document 1 at page 59.

22. These are notes of a conversation between JG and the investigator. The date of this conversation was 27 September 2019, so four days after JG had spoken to the hairdresser. The assertions made include that DL had borrowed money previously, that there was £20 outstanding from the previous amounts borrowed, and that she had asked to borrow more money but no further money had been lent. We make the following observations about this document:

i. The document is headed witness statement and is signed by JG. It is in note form and appears to be a verbatim record of a conversation in some parts, and a summary of conversation in other parts.

ii. The investigator begins with a leading question ('*I am just going to ask you a few questions about that money that one of our staff has borrowed from you, is that ok?*').

iii. There are only six questions, which are cursory and there is no probing of the witness' account, or follow up questions.

iv. There are some details tending to show that the witness was clear enough in her thinking to be able to make correct mathematical calculations ('probably getting on for £100, there is £20 outstanding, she has paid £80 back').

v. There is a striking absence of detail in other respects. For example JG does not say how much DL asked to borrow recently.

vi. JG appears to be saying that DL requested money from her on Monday at 8:20pm (although that is not clear). The implication is that it was the Monday just before this conversation. If so that would be Monday 23 September. That cannot be right as other documents show that the hairdresser reported the allegation on 23 September around 7:30pm.

vii. There is evidence of JG being confused when questioned. Part of the notes read '*Q has she pressured you to borrow money? A She came in one night about 8:20 after the other girls had gone home. Another lady called Joan from the old building, she (Joan) made her pay it back*'. The answer does not make sense when considered on its own, and does not appear to relate to the question which had been asked.

viii. This account would flag to a competent investigator a number of other avenues of investigation including finding out who Joan was and what she knew, looking at shift patterns to see whether DL was on duty or in the home on 23 September at the time given.

23. Overall this is a wholly unsatisfactory document which can be given very little evidential weight.

Document 2 p69

24. This is a record of some sort of the recollection of DB, the previous manager of the home who no longer worked there. She clearly knew the hairdresser in some capacity.

25. We note the following about this document:

i. It is entirely unclear what this document is. It is not clear whether it is DB's own note or whether it is a note made by somebody else of a conversation with DB. It's not clear what format this note was created in such as whether it was originally a handwritten note or an e-mail. It is not clear what purpose the note was created for.

ii. The note is undated.

iii. DB says that she was alerted by the hairdresser to an allegation on 23 October 2019. That is inconsistent with the date of 23 September 2019 which appears elsewhere.

iv. The allegation reported in this document has come through at least two people being the hairdresser and then DB.

v. There are differences between the detail of the allegation in this account and elsewhere. In particular this account refers to £15 still being owed from previous amounts borrowed, whereas Document 1 refers to £20.

Document 3 p70

26. This appears to record further questioning of JG by the investigator. We make the following observations:

i. It is dated 9 October which is over two weeks after the first report on the 23 September.

ii. There is no heading or explanation of what this document is or who created it. It is unclear whether this is a contemporaneous record of a conversation or whether it is a record made afterwards from some other source material. It does not appear on its face to be a verbatim record because it records some answers without questions.

iii. This note records a detail which is missing from other accounts, namely that the most recent request from DL was to borrow £15.

iv. The note is short, running to about 20 lines.

v. JG alleges that DL has borrowed money from '*staff, Joan, she lives about 4 houses down from here'*.

27. Again, obvious further investigative steps were apparently not taken or not recorded. We are not told whether there is a member of staff called Joan. It seems from other material (p53) that Joan may be another resident.

Document 4 p 71

28. This appears to be notes of a conversation between the investigator and the hairdresser. We make the following observations about this document:

i. It is dated 14 October, which is 3 weeks after the allegation was apparently made to the hairdresser.

ii. There are no names or heading on this document which makes it very hard to know what it is and what status it has. It bears a signature which appears to be the signature of the hairdresser and so appears to have been validated by her as her recollection.

iii. Parts of this record are inconsistent with other material. Most notably this document records that JG told the hairdresser that DL owed her £15 whereas she gave the amount of £20 when spoken to directly (Document 1).

iv. Again there is a lack of detail and it is not clear what JG had said to the hairdresser about <u>when</u> the request to borrow more money had been made.

v. There is reference in this document to JG telling the hairdresser that DL had borrowed money from other residents. We note a direct contradiction between this and what JG told the investigating officer, which was that DL borrowed from staff rather than residents (page 70).

Document 5 page 29

29. This is the investigating officer's report and we make the following observations:

i. The report is not signed or dated.

ii. The report includes information about what JG had told the investigating officer which does not appear on the face of either of the records of conversations between the investigating officer and JG (documents 1 and 3).

iii. The report refers to a conversation on 7 October between the investigating officer and JG. There are no other notes relating to such a conversation on that date.

iv. Details are given in this investigation report which clash with other accounts. For example the time of the request from DL for a further loan is said to be 7:20 AM in this report whereas the only time recorded elsewhere is 8:20 PM (in Document 1).

Document 6 p47

30. These are text messages from DL which are undated but appear from other documentation to be from October 2019. She says in summary that JG had previously made an allegation that money had gone missing, accusing other members of staff, that the home manager and police had been involved in investigating, that it was concluded that JG had been confused and that no further action was taken. It is plainly potentially highly significant that the complainant JG had or may have previously made an unsubstantiated allegation.

31. We make the following observations about that material.

i. It appears that DL was working in the care home at the time that JG apparently made that previous allegation. She could therefore be expected to have some detailed information about the allegation, the steps taken to investigate it, and the final findings.

ii. DL raised the issue of this previous allegation by JG with the home soon after she had been accused of wrongdoing. In DL's own account there is reference to the manager and police investigating. Either DL was honestly sharing information about something which had really happened, or she was lying to suggest that JG was unreliable. It would have been a bold lie because DL would have known, if it was a lie, that the police and manager would simply say they had never investigated any such thing.

iii. there is no other evidence on the face of the papers relating to that previous alleged allegation by JG, despite an order by Judge Poynter that such information should be provided by the home. In particular we note an absence of any information from the police about it, an absence of any records from the home about it, and absence of any information from the previous home manager about it. We do not draw an inference that there were no such documents because it appears that the home has not been entirely compliant with directions.

iv. JG's care records do not refer to that previous allegation. However, we would not expect them to. JG's care records are about her needs rather than any wrongdoings against her. We know that JG's care records do not contain any information about the allegation against DL which is the subject of this case either. It follows that the absence of information in the care records is an entirely neutral fact which cannot help us with whether DL's account about the previous allegation is correct or not.

v. There is no information to contradict the account given by DL about that previous allegation by JG.

G. Documents provided since the DBS decision which relate to JG's account

Document 7 care records

32. We were in the possession of care records relating to JG, which were not in the possession of DBS at the time that they made their decision. These records run to over 1000 pages most of which are entirely irrelevant.

33. We noted the following significant relevant information:

i. The care plan is divided into sections. In each section of the care plan there is an overarching entry which sets out JG's presentation and needs in relation to that particular area, such as memory, continence, nutrition etc. Those overarching entries are not dated. It appears to us that the overarching entry in each section would be updated with new information so that it was always a current record of the service user's needs in that area. There follows in each section a series of dated reviews which we

understand would record any significant change to the service users' presentation or needs.

ii. The overarching entry in the Memory and Understanding section records that JG had capacity. It says '*has a very good understanding of everything and can recall all conversations'*. The same section goes onto to record *'JG can appear confused at times'*. It is not possible to tell from the face of the records whether that entry was made when JG first went to the home at the end of 2018, or whether it was updated at some later point. It is not possible to say from the records therefore whether that entry about confusion was made before or after JG had made the allegation relating to DL in September 2019.

iii. Review entries in 2019 are inconsistent about JG's memory. They record '*can forget things at times*' on 6 November 2019 but '*does not demonstrate any concerns with memory and understanding'* on 7 December 2019 (p132).

34. DBS's evaluation of the evidence at the time of the decision, when they did not have these care records, included a finding that '*DL claims that JG gets confused however this is contradicted by the home who accepted her account as credible confirming she has capacity*' (p87). DBS's submission to the Upper Tribunal maintains that emphasis, submitting that JG '*had capacity during the period in which she made her disclosure*' (submissions p1673). That is beside the point. Capacity is plainly not the same as an absence of confusion. A person can have full capacity but still from time to time be very confused and mistaken. If any evidence was needed of that, it is apparent on the face of the care records which at page 128 refer to JG as having full capacity but also as being confused.

H. Our conclusions about reliability relating to JG

35. The investigation documents are not a reliable record of what people said because of the various deficiencies set out above in the analysis of individual documents.

36. We have no backup evidence to support and enhance the reliability of investigation documents such as confirmation that DL was on duty at the time that (on one version) the request to borrow money was made.

37. We find on the balance of probabilities that JG had previously made an unsubstantiated allegation as described by DL in text messages.

38. We do not find JG to be a reliable historian. Looking at the care records overall there is evidence that JG had moments or episodes of confusion and forgetfulness

starting on an unspecified date. The combination of these care records, the apparent non-sequitur answers on the face of JG's account, the inconsistencies in JG's various accounts and evidence of a previous unsubstantiated allegation leads us to conclude on the balance of probabilities that she was confused at the time of making the allegation against DL.

39. We stress that we do not make a finding that JG deliberately made a false allegation or behaved improperly in anyway in the course of the events.

40. We have reached the firm conclusion that there is no clear and cogent evidence that DL borrowed money, failed to return some, and asked to borrow more.

I. Documents gathered in the investigation relating to DL's account

Documents 8, material relating to the disciplinary proceedings

41. There are various documents which set out the history of disciplinary proceedings for example at page 26 and text messages around page 44. DL resigned from her position before the disciplinary proceedings were concluded. Throughout correspondence she maintained that she had not done anything wrong, and made no admissions.

42. We take the view that a decision not to participate in disciplinary proceedings is not evidence either way of somebody's guilt or innocence. A person who has been the victim of an untrue allegation may not have any faith in a disciplinary proceeding clearing their name, and equally a person who was guilty may not want to have a disciplinary hearing which may expose further evidence of that guilt. We do not consider it would be a rational inference to draw the DL decided not to participate because she was guilty.

Document 9, p28

43. There are some references to previous incidents where DL had borrowed money from others. For example at page 28 of the investigation report the investigating officer says that there is anecdotal information to suggest. It is entirely unclear to us where that anecdotal information comes from, noting in passing that JG had given inconsistent accounts about whether DL had borrowed from other residents or borrowed from staff, and that the hairdresser had made a comment about DL borrowing from residents but it was not clear on what basis she had made that comment.

44. We are not placing any reliance on those references to previous incidents: it is not a safe inference to draw that DL had borrowed money from other residents previously.

Document 10. Notes of interview of DL by the investigating officer.

45. These are again very poor records and we make the following observations:

i. the date of this interview was 30 September, a week after the allegation had been made.

ii. these are cursory and sloppy notes. It is unclear whether they are contemporaneous notes, or whether this document has been compiled from another document.

iii. The document is not accepted by DL to be an accurate record of this conversation (p1679). The document was meant to form the basis for a statement by DL within disciplinary proceedings, and it appears that the process which was anticipated in relation to this document was not completed. In particular it appears that DL was going to be given, or was given an opportunity to make any amendments to the note to correct any inaccuracies and then sign and return the document. There is no signed version of this document, and so it follows that there is no version which was ever approved by DL as being an accurate record of the conversation.

iv. The interview took 15 minutes according to timings on the document, but the short notes plainly do not reflect 15 minutes' worth of talking. At best these are abbreviated notes of a conversation.

v. We note that within this account there is a clear denial by DL. She says that she did speak to JG on Monday. She does not know why JG would say anything incorrect about that conversation.

vi. The document records that DL made a comment about buying cardigans from JG, and we note that this section of the document is particularly unclear.

46. We do not accept this document as being a reliable record of what DL said to the investigator on 30 September.

J. DL’s representations to DBS p75

47. Within these representations DL denies wrongdoing and says that there have been no previous allegations of abuse against her. She gives a great deal of information about DB’s alleged bullying behaviour towards her.

48. We have determined that DL's information about DB does not assist us. There is no basis for an inference that the previous home manager DB had somehow set up the whole allegation either by encouraging JG to make a false allegation or in some other way. It follows that we find that information about DB’s previous alleged behaviour is not relevant to our determination. For the same reason, information at p78 about DB’s behaviour does not assist.

K. Documents provided since the DBS decision which relate to DL's account

Document 11, representations from Citizens Advice 25th of February 2021

49. We note that DBS would not have had this document.

50. These representations include a second hand account about JG knitting cardigans. As DBS point out, there are significant differences between this account and the account in document 3. Given that we do not rely on document 3 as being an accurate record of the conversation with DL on the 30th of September 2019, it follows that we do not find that the account within this letter is inconsistent with anything that had been said before by DL.

L. Our findings in relation to DL's reliability

51. We do not find evidence of any inconsistency in DL's accounts for the reasons set out above.

52. DL has consistently denied the allegation.

53. We reject DBS's submissions about why we should find her unreliable. DL has speculated as to how and why the allegation against her came to be made, but we find it entirely understandable that a person accused of wrongdoing might speculate in that way, and do not draw an inference of guilt from that speculation.

54. We bear in mind that DL has worked in care for 17 years with no evidence of any previous fraudulent behaviour.

55. We find DL to be a reliable and credible historian and on the balance of probabilities we accept her repeated denials of wrongdoing.

M. Our conclusions

56. We consider that the balance of probabilities favours DL. We have come to that conclusion after considering the evidence as a whole including the significant new material which we had which DBS was not in possession of.

57. We find that DL did not borrow money, or fail to pay it back or ask to borrow more. It follows that we find that DBS made a mistake of fact in so finding.

58. In light of this result, it seems to us unnecessary to consider arguments relating to the mistakes on points of law raised by the appellant, and we do not do so.

N. Result

59. Given our finding that DBS's factual findings were mistaken in relation to the only matter relied on, it seems to us the only decision that DBS could lawfully reach would be to remove the appellant from the barred list.

60. The powers of the Upper Tribunal when it finds an error of law or fact were considered in AB v Disclosure and Barring Service [2021] EWCA Civ 1575, in which case the Court held that '…*the Upper Tribunal should direct removal only if it is satisfied that that is the only decision the DBS could lawfully make if the case were remitted to it.*' (per Lewis LJ at para. 75).

61. This case is on all fours with the example given by the Court of Appeal in that case at [73]

… The DBS may have considered that a person had been found to have engaged in sexually inappropriate conduct on one occasion with a child. If, on the facts, it transpired that the conduct had not in fact occurred (or the respondent had wrongly been identified as the person responsible) and the person had not been guilty of the conduct, there would be no basis for including that person in a barred list and the Upper Tribunal could direct removal.

62. It follows that we have directed DBS to remove the appellant from the barred list.

Kate Brunner KC
Upper Tribunal Judge
John Hutchinson
Suzanna Jacoby
Authorised for issue 12 August 2024