



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-000593-V
[2024] UKUT 88 (AAC)**

On appeal from the Disclosure and Barring Service

Between:

T.M.

Appellant

- v -

The Disclosure and Barring Service

Respondent

**Before: Upper Tribunal Judge Nicholas Wikeley
Upper Tribunal Member Roger Graham
Upper Tribunal Member Elizabeth Stuart-Cole**

Hearing date: 13 March 2024

Decision date: 26 March 2024

Representation:

Appellant: In person

Respondent: Mr Richard Ryan of Counsel, instructed by DBS Legal Team

DECISION

1. The decision of the Upper Tribunal is to dismiss the Appellant's appeal.
2. The Respondent's decision taken on 16 November 2022 to include the Appellant's name on the Children's Barred List did not involve any mistake of fact or error of law. The Respondent's decision is accordingly confirmed.

This Decision and the Orders that follow are given under section 4(5) of the Safeguarding Vulnerable Groups Act 2006 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

ORDERS UNDER RULE 14

Pursuant to rule 14(1)(a) the Upper Tribunal orders that no documents or information should be disclosed in relation to these proceedings that would tend to identify any person who has been involved in the circumstances giving rise to this appeal.

Pursuant to rule 14(1)(b) the Upper Tribunal orders that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify either the Appellant, members of her family or the foster children involved in this matter.

REASONS FOR DECISION

The outcome of this appeal to the Upper Tribunal in a sentence

1. We dismiss the Appellant's appeal to the Upper Tribunal.

A summary of the Upper Tribunal's decision

2. We conclude that the Disclosure and Barring Service's decision does not involve any mistake of fact or error of law, which are the only bases on which we can interfere with that decision. Accordingly, we have no option but to confirm the Respondent's decision to include the Appellant on the Children's Barred List.
3. We appreciate this decision will be a considerable disappointment to the Appellant. We wish to record at the outset that we were impressed by the way the Appellant conducted her appeal. We are also in no doubt that she did the very best that she could in extremely challenging circumstances. However, the right of appeal in safeguarding cases is not a 'full merits review' type of appeal. Instead it is limited in the way summarised in the previous paragraph. In particular, the decision as to whether it is "appropriate" to bar a person carries no right of appeal to the Upper Tribunal.

Introductory matters

4. This is the Appellant's appeal against the Disclosure and Barring Service's final decision, dated 16 November 2022, to include her on the Children's Barred List under the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act').
5. We held an oral hearing of the full appeal at Field House in London on 13 March 2024. The Appellant attended in person, representing herself, and supported by her husband. Mr Richard Ryan of counsel appeared on behalf of the Respondent (the Disclosure and Barring Service or 'the DBS'). The only other persons present at the hearing were the tribunal clerk and two judicial observers (Upper Tribunal Judge West and Regional Tribunal Judge Jones, neither of whom took any part in the proceedings or deliberations).

The rule 14 Orders on this appeal

6. We refer to the Appellant as Mrs M in order to preserve her privacy and anonymity. For that same reason, we make the rule 14 Orders included at the head of this decision. We are satisfied that neither the Appellant (and her family) nor the foster children should be identified in this decision, whether directly by name or indirectly. We are also satisfied that any publication or disclosure that would tend to identify any person who has been involved in the circumstances giving rise to this appeal would be likely to cause serious harm to those persons. Having regard to the interests of justice, we were accordingly satisfied that it is proportionate to make the rule 14 Orders. To avoid the possibility of 'jigsaw identification' (by which we mean pieces of evidence might be put together to identify those concerned), we refer to the fostering agency involved simply in those general terms rather than by name.

A very brief summary of the background

7. This appeal concerns events in or around December 2021 and January 2022. Mrs M and her husband had recently begun as foster parents employed by the fostering agency. Their first placement involved four siblings aged 16 (SC), 7, 4 and 1 years old (SPC) who came from a very troubled family background. The

DBS decision to bar Mrs M was based on two incidents involving interactions between her and the 16 year old SC which amounted, to the very least, as heated conversations. The alleged emotional abuse was captured on audio by SC. Following an investigation under LADO procedures, the fostering agency made a DBS referral – where it was reported that the audio clips record Mrs M shouting at SC continuously and making inappropriate comments about SC and her father. Before looking at these events in more detail, we remind ourselves of the statutory framework governing safeguarding appeals.

The statutory framework

Introduction

8. 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. This may be on the basis of either an individual’s “relevant conduct” – in effect their past behaviour – paragraphs 3 & 4 or the risk of harm they pose now and for the future (paragraph 5). This appeal concerns the former of those two discretionary routes to barring, which we now consider in more detail.

The basis for a “relevant conduct” barring decision

9. Paragraphs 3 and 4 of Schedule 3 to the 2006 Act deal with behaviour or “relevant conduct” in relation to children, and are in issue in the present case. So far as is relevant, they provide as follows:

9.(1) This paragraph applies to a person if—

(a) it appears to DBS that the person —

(i) has (at any time) engaged in relevant conduct, and

(ii) is or has been, or might in future be, engaged in regulated activity relating to children, and

(b) DBS proposes to include him in the children’s barred list.

(2) DBS must give the person the opportunity to make representations as to why he should not be included in the children’s barred list.

(3) DBS must include the person in the children’s barred list if—

(a) it is satisfied that the person has engaged in relevant conduct,

(aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and

(b) it is satisfied that it is appropriate to include the person in the list.

10.(1) For the purposes of paragraph 9 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;

...

(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.

...

10. However, the issue in this case was not so much the meaning of “relevant conduct” but rather whether the DBS had established the allegations it had made against Mrs M and whether its findings involved any mistake(s) of fact or legal error.

Rights of appeal

11. An individual’s appeal rights against a DBS barring decision are governed by section 4 of the 2006 Act:

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

(a) ...

(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 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. We highlight sub-section (3), namely 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” and so, in effect, is non-appealable. We now turn to the details of this appeal.

The DBS investigation and the decision to bar the Appellant under SVGA 2006

13. For present purposes we need only summarise the main features of the DBS process as follows.
14. On 25 April 2022 the DBS sent Mrs M an “early warning” letter to the effect that they were looking into an allegation of emotional abuse made by the fostering agency.
15. On 9 September 2022 the DBS sent Mrs M a “minded to bar” letter , together with disclosure of associated documentation relied upon by the Respondent in reaching its decision. This letter set out the DBS’s preliminary findings on the balance of probabilities.
16. On 2 November 2022 Mrs M responded to the DBS minded to bar letter through her then solicitors, explaining why she rejected the DBS allegations and including several character references as well as other supporting evidence.
17. On 6 November 2022 the DBS issued its final decision letter, notifying Mrs M that the DBS had decided it was appropriate and proportionate to include her on the Children’s Barred List. The two central findings were put in these terms:

“Whilst employed as a Foster Carer ... you caused emotional and verbal harm to vulnerable foster children in your care by:

- on an unspecified date prior to 17 January 2022 making inappropriate comments and continuously shouting at SC a Foster Child in your care, then aged 16 years, when SPC, then aged one year was in the vicinity and whose care you neglected;
- and on 18 January 2022 ignoring professional advice from a Local Authority Social Worker not to approach SC, a 16 year old foster child in your care, following disclosure of an audio recording of verbal abuse of SC and proceeded once again to make inappropriate comments, mock and laugh at SC.

Having considered this, DBS is satisfied you engaged in relevant conduct in relation to children. This is because you have engaged in conduct which endangered a child or was likely to endanger a child.”

18. It is now not in dispute that the incident described in the first bullet point above took place on 27 December 2021. In this decision we refer to that event as the first incident and the follow-up event in January 2022 as the second incident. A fuller justification for the DBS’s decision to bar the Appellant was contained in the Respondent’s Barring Decision Summary document.

A summary of the grounds of appeal to the Upper Tribunal

19. Helpfully, Mrs M’s position was very clearly set out in the grounds of appeal as follows:

“4. TM’s career as a foster carer was in its infancy, the incidents relied upon by the DBS relate to TM’s first placement as a Foster Carer.

5. SC (aged 16) and her three younger siblings ... aged 7 ... aged 4 and SPC (aged 1) were placed with TM and her husband on 9 September 2021 in an emergency by [social workers] during the night. The placement was made on a short-term basis, no more than a few weeks in duration. By the time the incidents relied upon by DBS occurred, the placement had lasted over 18 weeks.

6. In December 2021, TM had cause to raise the following concerns with appropriate authorities:

6.1 A sibling group of four children was placed in TM's care despite her requesting that no more than three children be placed with her at any given time;

6.2 SC's behaviour was such that TM requested the child's placement be terminated;

6.3 TM applied for respite care provision which was refused by social services;

7. TM is remorseful and fully accepts that her behaviour on 27 December 2021 was inappropriate, more particularly described as a "sudden emotional outburst resulting from accumulated stress and pressures of dealing with SC's behaviour and attitude".

8. TM has undertaken further training since 18 January 2022 and has also sought out cognitive behavioural therapy.

9. In all the circumstances, the decision of DBS to add TM to the Children's Barred List was not appropriate or proportionate."

20. On 19 September 2023 Upper Tribunal Judge Wikeley gave Mrs M permission to appeal, observing as follows:

"I have the benefit of a statement from the Applicant, annexed to the detailed grounds of appeal drafted by her legal representative. In summary, it is argued that the Respondent (1) made certain mistakes of fact; (2) failed to attach sufficient weight to important information; and (3) failed to conduct a risk assessment. It is further submitted that the decision to bar TM was disproportionate. The grounds may face some difficulty insofar as they may be seen as an invitation to the Upper Tribunal to engage with the assessment of appropriateness, which of course lies outside the Tribunal's remit. However, I consider in all the circumstances that the grounds of appeal are at least arguable and so I should give permission to appeal."

The Appellant's evidence

Introduction

21. We had the benefit of evidence from Mrs M which was not available to the DBS in two respects. The first was in the form of the Appellant's witness statement dated 15 September 2023 that was lodged with the grounds of appeal. The second, of course, was Mrs M's oral evidence given at the Upper Tribunal hearing on 13 March 2024.

The Appellant's witness statement

22. The Appellant's witness statement begins as follows;

“2. I have had time to reflect on my behaviour since the date of the incidents giving rise to the concerns that I had caused emotional harm or risk of emotional harm to a child in my care as a foster carer.

3. I am writing this statement as a sincere acknowledgement of my remorse and regret about my conduct during my time as a foster carer, particularly in relation to not listening to the advice of the professionals at my foster agency and for shouting whilst a foster child was in my care.

4. I am highly embarrassed about the way that I acted and I am making this statement to set out my understanding now of my failings at that time, reasons for the same and what steps I have taken to become more aware and in control of my emotions and my behaviour.”

23. The Appellant then goes on to outline some of the circumstances of the foster children’s emergency placement and the difficulties that these posed. She goes on to acknowledge (at para 10) that “despite the difficulties I was suffering at the time, my actions could have caused emotional harm to a child who was vulnerable and the way this incident made her feel unsafe in the placement. I would like to take this opportunity to state that this is not at all my usual character”. She also describes the counselling and parenting courses she has taken and how she has put that learning into practice. She concludes by accepting that she “resigned as a foster carer after acknowledging my failings in this matter” (para.22).
24. We accept that the Appellant’s witness statement demonstrates genuine remorse and shows considerable insight following a period of intense self-reflection on her part.

The Appellant’s oral evidence

25. We said at the outset of this decision that we were impressed by the way that the Appellant conducted her appeal. This was particularly so with regard to her oral evidence. Mrs M spoke to us for nearly an hour before taking a break. She gave a clear narrative account of the relevant events. The thoughtful manner in which she gave her evidence reinforced the impression we had had from reading her witness statement. We had no hesitation in accepting her as a credible witness as to the truth. We find that for the most part Mrs M discharged her responsibilities as a foster carer with considerable care and with great diligence. The difficulty for her, as Mr Ryan pointed out, was that although the Appellant gave a compelling account, it was an account that the DBS took into consideration when making its decision.
26. Given that Mr Ryan did not seriously challenge the Appellant’s account, we do not consider it necessary to record all the details of her oral evidence. Suffice to say that Mrs M provided a convincing description of the very real and very intense emotional and practical challenges posed by fostering four children from a very troubled background. We recognise that the fostering agency is not a party to these proceedings and we have not had direct evidence from them, but we have concerns about the level of support that was provided to Mrs M during this most difficult time. As the Appellant put it to us, she was always chasing the agency for help, but help was not forthcoming. By the time of the first incident, she described how she was completely exhausted and how “I really lost it – I’m not proud of

that. I was so upset, I needed to see someone”. She did not dispute the transcript of the audio recording made by SC.

27. We now turn to consider the grounds of appeal in more detail.

The Appellant’s grounds of appeal

Ground A

28. The first ground of appeal is that the DBS is said to have made mistakes of fact in two respects.
29. The first alleged error of fact is that in relation to the first incident “SPC was not left alone crying for over one minute. SPC was being held and comforted by SC whilst the interaction between TM and SC was ongoing, TM of course also being present”.
30. We are not persuaded that the DBS finding involves any material mistake of fact in this respect. So far as SPC was concerned, the primary findings were that SPC was “in the vicinity” and his care was neglected during this episode. Be that as it may, the principal disturbing feature of the first incident was the nature of the interaction between Mrs M and SC, both in terms of what was said and how it was said. SPC’s presence during the episode was in a sense incidental, and did not make a material contribution to the overall decision on this allegation.
31. The second alleged error of fact is that “TM was not advised not to discuss the recording of the incident on 27 December 2021 with SC on 18 January 2022, but rather had been told more generally ‘to leave the matter for a couple of days and not to talk to SC about it’”.
32. There is an element of splitting hairs with this alleged error of fact. We note that in her representations Mrs M accepted she was advised not to speak to SC about the recording and it was a spur of the moment decision to ask about it, which she has accepted was an error on her part. Furthermore, in her witness statement Mrs M expresses remorse and regret, particularly in relation to not listening to the advice of professionals.
33. This ground of appeal does not succeed.

Ground B

34. The second ground of appeal is the argument that the DBS omitted or failed to attach sufficient weight to important information in reaching its final barring decision. However, the matters referred to in the ground of appeal were raised in Mrs M’s representations in response to the minded to bar letter and were addressed by the DBS in its carefully reasoned decision. For example, the exceptional and ongoing aspects of the emergency placement, including the difficulties in managing SC, the oldest of the foster children, were referred to in several places in the Barring Decision Summary document. The impact on Mrs M of the barring decision was properly considered as part of the considerations relating to proportionality and Article 8.
35. Determining proportionality primarily involves determining whether the Appellant posed a continued risk of harm to children at the time of her inclusion on the barred list. However, it also involves taking into account the impact on the Appellant of the barring decision and answering the four questions set out in the case of *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1

AC 621. Those questions are (1) is the legislative objective sufficiently important to justify limiting a fundamental right?; (2) are the measures which have been designed to meet it rationally connected to it?; (3) are they no more than are necessary to accomplish it?; and (4) do they strike a fair balance? We must also bear in mind that where it is argued that a decision to include a person on a barred list is disproportionate to the relevant conduct or the risk of harm relied on, case law requires that we must afford appropriate weight to the judgement of the DBS as a body empowered by statute (in the form of the 2006 Act) to decide appropriateness (see e.g. *ISA v SB and RCN* [2012] EWCA Civ 977 at paragraphs 17-22). Taking all those matters into account, we cannot say that the decision was disproportionate.

Ground C

36. The third and final ground of appeal is the submission that the DBS erred in law in reaching its decision because it is said to have failed to conduct an assessment of risk in accordance with Schedule 3, Part 1, paragraph 5 of the 2006 Act. This ground is not persuasive. The Structured Judgement Process (SJP), as set out in the detailed Barring Decision Summary document, identified several concerns in relation to a range of relevant risk factors involving both emotional factors and behavioural factors. We are satisfied that the DBS has undertaken a risk assessment on the basis of the findings of fact which were in turn grounded in the evidence before it. This ground therefore does not succeed.
37. In that context we recognise that there is a distinction between (i) deciding as a matter of fact whether a person poses a risk and (ii) deciding on the level of the risk posed by way of a risk assessment. The latter “type of assessment is dependent on a multifactorial review of key variables that are both static and dynamic in nature, and context dependent. Put more simply, the assessment of the level of risk is a matter of weighting for the decision-maker. This is the type of risk assessment which is often fundamental to the question of appropriateness and over which the DBS has exclusive jurisdiction” (*AB v DBS* [2022] UKUT 134 (AAC) at paragraph 51).

Conclusions on grounds of appeal

38. It follows that we conclude that none of the grounds of appeal is made out and so we must dismiss the appeal.
39. We appreciate it will be little consolation to Mrs M that we were impressed by her evidence and the way that she gave it. We echo Mr Ryan’s observation that the Appellant gave a compelling account but it was an account which the DBS took into consideration. Certainly we are unable to identify a material mistake of fact or error of law on the part of the DBS. The reality is that the main thrust of Mrs M’s arguments went to the issue of whether it was appropriate for her to be barred. However, as we have explained above, the issue of appropriateness is by statute a matter for the exclusive determination of the DBS and carries no right of appeal.

Disposal

40. Having decided that the DBS decision does not involve any mistake of fact or error of law, there can only be one outcome to this appeal. This is because section 4(5) of the 2006 Act states as follows:

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

41. That being so, we must by law confirm the DBS's decision.

Conclusion

42. It follows from our reasons as set out above that the Appellant's appeal to the Upper Tribunal is dismissed.

**Nicholas Wikeley
Judge of the Upper Tribunal**

**Mr Roger Graham
Specialist Member of the Upper Tribunal**

**Dr Elizabeth Stuart-Cole
Specialist Member of the Upper Tribunal**

Approved for issue on 26 March 2024