



Neutral Citation Number: [2025] UKUT 030 (AAC)

Appeal No. UA-2021-000319-V

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

DKS

Appellant

- v -

THE DISCLOSURE AND BARRING SERVICE

Respondent

Before: Upper Tribunal Judge Church with Tribunal Members Stuart-Cole and Turner

Hearing date: 28 November 2024

Mode of hearing: Remote oral hearing by CVP

Representation:

Appellant: Mr Justin Hugheston-Roberts of counsel, instructed by Blackfords LLP

Respondent: Mr Tim Wilkinson, instructed by Ms Edith Holt of the DBS's legal department

On appeal from: The Disclosure and Barring Service

Case No: 00934543671

Decision Date: 28 September 2021

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings. This order does not apply to: (a) the appellant; (b) any person to whom the appellant discloses such a matter or who learns of it through publication by the appellant; or (c) any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

SUMMARY OF DECISION

SAFEGUARDING VULNERABLE GROUPS (65) Adults' Barred List (65.2)

Judicial summary

This appeal is mainly about whether the DBS made a mistake of fact in finding that DKS had, while working as a Senior Carer at a care home, shouted and sworn at a resident who had soiled himself, and in finding that DKS had shouted at or spoken abruptly to, other residents and told residents that they use their buzzers too much.

It also raises an issue about whether the DBS made a mistake of law by failing to await the outcome of criminal proceedings arising out of the same allegations before making a final decision to place DKS's name on the Adults' Barred List.

We decide that the DBS's decision involved no material mistake of fact or law and dismiss the appeal.

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 judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the Disclosure and Barring Service was not based on any mistake of fact and did not involve any mistake on any point of law. The decision is confirmed.

REASONS FOR DECISION

Introduction

1. This case concerns allegations that DKS, while working as a Senior Carer in a care home, abused elderly residents he was supposed to be caring for. The DBS found the allegations to be true and placed DKS's name on the Adults' Banned List to prevent him from working in regulated activity with vulnerable adults.
2. DKS appeals against that decision. He bases his appeal on two arguments:
 - a. the DBS made its decision prematurely, because the allegations against DKS were the subject of criminal proceedings. This meant that:
 - i. further evidence was liable to be disclosed in the criminal trial which could assist DKS's case against barring;
 - ii. DKS had to be exceptionally circumspect in making his representations against barring for fear of prejudicing his position in the criminal proceedings, depriving him of an effective opportunity to challenge the allegations against him; and
 - iii. while the DBS made its findings based on a review of paper evidence only, in the criminal trial the evidence of the witnesses would be tested rigorously under cross-examination.
 - b. He didn't do it.

Factual background

The agreed facts

3. The agreed facts are that in 2020 DKS was working as a Senior Carer at a care home with 29 single bedrooms catering for residents with a variety of support needs including in relation to dementia, mobility and incontinence (the “**Care Home**”).
4. During the night shift of 27-8 April 2020, DKS was on duty as Senior Carer with colleagues SH and KG as Carer Assistants.
5. DJ was a resident at the Care Home at the relevant time. He suffered from dementia and required support with incontinence. DJ has since died.
6. On 5 May 2020 SH made allegations to her manager, MS, that DKS had ill-treated patients (see paragraphs 10-11 below).
7. DKS’s employer suspended DKS from duty on 6 May 2020 pending the outcome of an internal disciplinary investigation into the allegations, all of which DKS denied.
8. On 26 May 2020 DKS attended voluntarily for interview by the police in connection with the allegations, which he denied.
9. DKS was dismissed by his employer on 1 July 2020 on the basis that it found the allegations against him to be established. The decision to dismiss DKS was challenged and reconsidered but confirmed on 3 August 2020.

The allegations

10. It was alleged by SH that around 10pm on 27 April 2020 at the Care Home DKS had emotionally abused resident DJ by shouting “You’re fucking disgusting, you’re fucking dirty, you’re a dirty bastard, fucking vile DJ” after DJ had covered himself and the walls in faeces, and when DJ shouted out, DKS put the duvet cover over DJ’s mouth, and that this resulted in DJ suffering emotional harm.
11. It was further alleged that DKS had, on multiple occasions, spoken abruptly to, and shouted at, other service users, including telling service users off for using their buzzers too often or for shouting out. It was said that this had the potential for service users to feel fearful of him.

DKS's Written Representations

12. On 16 August 2020 DKS's representative, Blackfords LLP, made written representations to the DBS. Those representations pointed out that DKS's request for a 4-5 week extension of time to provide his representations had been denied (with only a 1 week extension being granted) and stated that DKS was seeking further information and evidence to support his case against being barred. The representations criticised the evidence on which the DBS was relying and argued that it would be inappropriate and/or disproportionate for the DBS to make a final barring decision before the disclosure of evidence in the criminal proceedings and before the evidence had been tested at the Crown Court trial.
13. The representations included an account of the events of 27 June 2020, saying that DKS and SH attended DJ's room just before 10pm when DJ could be heard shouting in his room. They found that DJ had soiled himself and required a change of clothes and bedclothes, which DKS and SH did "without incident" (see page 194 of the appeal bundle).
14. The representations deny that DKS covered DJ's face with bedding, or any form of sheet or blanket, or that he ill-treated or shouted at DJ or any other resident. They state that if SH had been cleaning DJ's bottom from behind as she claimed, she wouldn't have been able to see anything in front of DJ's face, and they say that due to DJ's room being so small, there would have been insufficient space for DKS to have any physical contact with DJ while DJ was being attended to by SH (see page 195 of the appeal bundle). They suggest that if DKS had done what was alleged SH would surely have called for help, said something at the time, or at least reported the incident earlier than she did.
15. They explain that allegations of DKS shouting or speaking abruptly to residents may have arisen as a result of DKS's attempts to make himself understood when speaking with a mask on (due to then-prevailing Covid rules).
16. The representations deny that DKS ever told any resident that they use their buzzers too much and pointed out that all three residents who had alleged that he had lacked capacity and had dementia (see page 194 of the appeal bundle).
17. The representations suggest that there was evidence of a vendetta against DKS, who had been hired to raise standards following a critical Care Quality Commission report and was not liked by those junior to him (see page 196 of the appeal bundle).

The Barring Decision

18. In its 'Final Decision Letter' dated 18 September 2021 the DBS informed DKS that it had considered representations made on his behalf by Blackfords LLP, but had nonetheless decided that it was appropriate and proportionate to place his name on the adults' barred list (the "**Barring Decision**"). It made the Barring Decision because it was satisfied that DKS had been engaged in 'regulated activity' because he had been employed as a senior care assistant. It found that DKS had also engaged in 'relevant conduct' in relation to a vulnerable adult. This was because it was satisfied on the balance of probabilities that:

"On 27 April 2020, [DKS] shouted and swore at service user DJ and covered his mouth with a duvet cover.

On various occasions, [DKS] shouted at or spoke abruptly to service users DJ and DA and VP and on occasions told service users they use the buzzer too much" (see page 199 of the appeal bundle)

19. The DBS explained its findings further as follows:

"It is considered that [DKS has] intentionally abused DJ by shouting "You're fucking disgusting, you're fucking dirty, you're a dirty bastard, fucking vile D" after DJ had covered himself and the walls in faeces. When DK shouted out, [DKS] put the duvet over DJ's mouth.

It is reasonable to conclude that DK would have suffered emotional harm being shouted at and called names by a member of staff who was employed to provide care. It is accepted that the duvet was placed over DJ's mouth for a few seconds due to DJ shouting out and there is no evidence it was held down by [DKS] in an attempt to restrict his breathing, however this was an entirely inappropriate response and would have likely caused additional distress."

We are also of the view that [DKS has] spoken abruptly and shouted at other service users. In particular, [DKS] told service users off for using the buzzers too often or for shouting out. [DKS's] actions have the potential for service users to feel fearful of [him] and one service user told a staff

member that they were unhappy when [DKS] was on duty" (see page 200 of the appeal bundle).

The criminal proceedings

20. DKS attended a trial at Leeds Crown Court on a single count of ill treatment of an individual by a care worker contrary to Section 20(1) and (2) of the Criminal Justice and Courts Act 2015, namely that between the 26th day of April 2020 and the 3rd day of May 2020, then having care of [DJ], by virtue of being a care worker, ill-treated him.
21. On arraignment, KDS pleaded 'Not Guilty'. At trial DKS and colleagues SH, KG and MS gave evidence, as did three police officers involved in the case. They each had their evidence tested under cross-examination.
22. At the conclusion of the trial DKS was acquitted by the jury.

Legal framework

The statutory scheme

23. There are multiple gateways under Schedule 3 to the SVGA to a person's name being included on a barred list.

The 'relevant conduct' gateway

24. In this case the DBS relied upon the 'relevant conduct' gateway. That required the DBS to be 'satisfied' of three things:
 - a. that DKS was at the relevant time, had in the past been, or might in future be 'engaged' in, 'regulated activity' in relation to vulnerable adults (see paragraph 9(3)(aa) of Schedule 3 to the SVGA);
 - b. that DKS had 'engaged' in (see paragraph 9(3)(a) of Schedule 3 to the SVGA) 'relevant conduct' (defined in paragraph 4); and
 - c. that it was 'appropriate' to include DKS on the adults' barred list (see paragraph 9(3)(b) of Schedule 3 to the SVGA).
25. If the DBS was satisfied of all three matters above, it was required to place DKS's name on the adults' barred list.

26.

DKS accepts that the 'regulated activity' requirement is met in this case by reason of his having worked as a Senior Care Assistant (see page 22 of the appeal bundle), so there is no issue with regards to 24 a. above.

27. With regard to the issue at 24 b., it is accepted by DKS that the alleged conduct relied upon by the DBS would, if engaged in, amount to 'relevant conduct' in relation to a vulnerable adult (see page 192 of the appeal bundle). DKS maintains, however, that the DBS's findings are mistaken because he didn't do what was alleged.

28. In terms of issue c. in paragraph 24 above, 'appropriateness' is not a matter for the Upper Tribunal unless the decision-making around appropriateness is irrational (see below).

The Upper Tribunal's jurisdiction under the SVGA

29. Section 4 of the SVGA sets out the circumstances in which an individual may appeal against the inclusion of their name in the barred lists or either of them. An appeal may be made only on grounds that the DBS has made a mistake on any point of law or in any finding of fact which it has made and on which the barring decision was made (see section 4(1) and (2) of the SVGA).

30. An appeal under section 4 SVGA may only be made with the permission of the Upper Tribunal (see section 4(4) SVGA).

31. Unless the Upper Tribunal finds that the DBS has made a mistake of law or fact, it must confirm the decision of the DBS (see section 4(5) of the SVGA). If the Upper Tribunal finds that the DBS has made such a mistake it must either direct the DBS to remove the person from the list or remit the matter to DBS for a new decision.

32. Following *DBS v AB* [2021] EWCA Civ 1575 ("**DBS v AB**"), the usual order will be remission back to DBS unless no decision other than removal is possible on the facts.

33. If the Upper Tribunal remits a matter to DBS under section 4(6)(b) the Upper Tribunal may set out any findings of fact which it has made (and on which the DBS must base its new decision) and the person must be removed from the list until the DBS makes its new decision, unless the Upper Tribunal directs otherwise.

34.

Section 4(3) SVGA provides that, for the purposes of section 4(2) SVGA, whether or not it is ‘appropriate’ for an individual to be included in a barred list is “not a question of law or fact”.

The relevant authorities

35. The relevant principles regarding factual mistakes have been set out in several recent decisions of the Court of Appeal (see *PF v DBS* [2020] UKUT 256 (AAC); *DBS v JHB* [2023] EWCA Civ 982; *Kihembo v DBS* [2023] EWCA Civ 1547; and *DBS v RI* [2024] EWCA Civ 95). These decisions are binding on the Upper Tribunal.

36. In relation to whether it is ‘appropriate’ to include a person in a barred list, the Upper Tribunal has only limited powers to intervene. This is clear from the section 4(3) SVGA and relevant case law. The scope for challenge by way of an appeal is effectively limited to a challenge on proportionality or rationality grounds. The DBS is well-equipped to make safeguarding decisions of this kind (*DBS v AB* (paras 43-44, 55, 66-75)).

37. At paragraph [55] of *DBS v AB*, the Court cautioned:

“[The Upper Tribunal] will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter...”.

and at paragraph [43], the Court stated:

“...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..., is a matter for the DBS”.

38. In the subsequent Upper Tribunal case, *AB v DBS* [2022] UKUT 134 (AAC), the Upper Tribunal decided (albeit in the context of a case that was based on the ‘risk of harm’ rather than the ‘relevant conduct’ gateway) that *DBS v AB* meant that the Upper Tribunal could consider, on appeal under the SVGA, a finding of fact by DBS that an individual poses “a risk” of harm but not a DBS assessment of the “level of the risk posed” (see [49]-[52] and [64]).

39. When considering appeals of this nature, the Upper Tribunal:

“must focus on the substance, not the form, and the appeal is against the decision as a whole and not the decision letter, let alone one paragraph... taken in isolation”: *XY v ISA* [2011] UKUT 289 (AAC), [2012] AACR 13 (at [40]).

40. When considering the Barring Decision, the Upper Tribunal may need to consider both the Final Decision Letter and the document headed ‘Barring Decision Summary’ that is generated by DBS in the course of its decision-making process. The two together, in effect, set out the overall substantive decision and reasons (see *AB v DBS* [2016] UKUT 386 (AAC) at [35] and *Khakh v ISA* [2013] EWCA Civ 1341 at [6], [20] and [22]).
41. The statement of law in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 indicates that materiality and procedural fairness are essential features of an error of law and there is nothing in the SVGA which provides a basis for departing from that general principle (*CD v DBS* [2020] UKUT 219 (AAC)).
42. DBS is not a court of law. Reasons need only be sufficient/adequate. DBS does not need to engage with every potential issue raised. There are limits, too, as to how far DBS needs to go in terms of any duty to “investigate” matters or to gather further information for itself, but it must carry out its role in a way that is procedurally fair.

The grounds of appeal and the parties’ submissions

43. The case put by Mr Hugheston-Roberts was a simple one: it was accepted that the regulated activity condition was met, and it was accepted that the behaviour which the DBS found DKS to have engaged in amounted to ‘relevant conduct’, but it was not appropriate for the DBS to have made the Barring Decision for the simple reason that DKS didn’t mistreat DJ or any other resident as he is alleged to have done.
44. Further, the DBS acted prematurely in making the Barring Decision based on what Mr Hugheston-Roberts describes as its “desktop audit” of DKS’s employer’s investigation. He says that the DBS should have waited for the outcome of the criminal proceedings, in which the witnesses’ evidence was tested under cross-examination. Having heard the evidence and been directed by the judge on the law, the jury acquitted DKS of the sole charge on the indictment, and the Upper Tribunal should now find that the Barring Decision

involved mistakes of both law and fact and DKS's name should be removed from the Adults' Barred List.

45. The DBS resisted the appeal, maintaining that it was not under any obligation to await the outcome of the criminal proceedings (which were determined according to the civil, not criminal, standard of proof), it was entitled to make the findings that it did based on the evidence before it, and the Barring Decision involved no material mistake of law or fact. Mr Wilkinson argued that, in these circumstances, the Upper Tribunal had no choice but to confirm the Barring Decision.

The evidence at the hearing before the Upper Tribunal

46. DKS was called as a witness at the hearing before the Upper Tribunal and was cross-examined by Mr Wilkinson, for the DBS, and questioned by the panel.
47. No witnesses were called by the DBS.
48. In his evidence DKS explained that he had worked in the care industry since he was 16 years old, initially as a volunteer and then as a care assistant. Since 2011 he had performed the role of senior care assistant. He had undertaken training in care for patients with dementia and was a 'dementia champion'. DKS said he had worked at the Care Home since 2016, when he had been recruited by the then manager of the home to get the home back up to standard after it had been found on inspection by the Care Quality Commission to have been failing in various respects.
49. DKS said he passed his probation period without incident, he developed a "very strong" relationship with management, and had no problems with the people he worked with. He said that until the allegations which resulted in the referral to the DBS no complaints had been made about him.
50. DKS described the layout of the Care Home: it was a converted house with three floors, with a ward on each floor. He said that DJ's room, 12A, was on the middle floor.
51. DKS said that each resident at the Care Home has an individual care plan, to which each member of staff has access. He would expect any incident with a resident to be recorded in that resident's care plan. DJ's care plan was kept in a filing cabinet at the 'senior's station' outside DJ's room. The Care Home operated on the basis of 3 shifts per day (8am-2pm, 2pm-8pm and an 8pm to 8am night shift). Those staff members coming off shift would brief the incoming

staff on any significant incidents that had occurred during the shift. DKS said if a resident hadn't eaten, or hadn't taken their prescribed medication, that would be recorded both in their care plan and in a handover sheet, and if patients had soiled themselves, that too would be recorded in both documents.

52. DKS drew the panel's attention to the night check record at pages 384-395 of the appeal bundle. He said staff would complete this template, detailing the identity of the relevant resident (by their initials), where they were located (by their room number), the time of the check, and the status of the relevant resident (for example, 'A' signified that the resident was awake, and 'AIT' signified that the resident was awake and incontinent and taken to the toilet), as well as the identity of the person completing the check (by their initials). DKS explained that where a resident was required to be looked after by two members of staff both staff members' initials would be recorded on the chart.
53. DKS said that on the night of 27-8 April 2020 he was on duty as Senior Carer with two colleagues, SH and KG.
54. He pointed out that the night check record for 27-28 April 2020 (at page 387 of the appeal bundle) shows that he carried out checks on residents in rooms 1-15 between 22:00 and 22:20 (including recording resident DJ to have been awake in room 12A at 22:16), while his colleague SH had carried out checks on the residents in rooms 16-21 between 22:00 and 22:10, and colleague KG had carried out checks on residents in rooms 22-29 between 22:00 and 22:14. He highlighted that there was no record to show that he was in DJ's room with any other staff member at or about 22:00.
55. DKS drew the tribunal's attention to the document at 396-397 of the appeal bundle, which was the 'Daily Statement of Wellbeing' relating to resident DJ. He said "if something had happened at the home it would be recorded here". He pointed to the only entry for the night shift on 27-28 April 2020, which indicates that it was made by colleague KG at 2am, recording:

"[DJ] had supper in his room. Went to bed at 8:45, had assistance to bed, [DJ] has been asleep on 2 hourly room checks no concerns for [DJ]"
56. DKS said that if a resident had soiled himself and had to be taken out of bed and changed, that would be in the Care Plan and in the night check log. Similarly, if a resident had been the victim of an assault that too would be in the care record, and if it were not in the care record there would be a big investigation as to why it wasn't recorded.

57.

DKS also gave evidence about the layout of DJ's room (room 12A). He said there was an ensuite with a wash basin, a commode, 3 sets of drawers and a bed. He said that the layout of the room was such that it was impossible for one member of staff to change the bed while another cleaned DJ.

58. DKS denied assaulting DJ, abusing DJ, placing any bedding or material over DJ's face, using foul language or verbal insults, and said that had he done so he would expect any staff witnessing such behaviour to report it and to place it on record.
59. DKS also denied being verbally abusive or aggressive towards any other resident.
60. He said he had never let a resident lie in their own urine in bed or prevented a resident from accessing their emergency buzzer.
61. DKS described the "huge" impact that being placed on the Adults' Barred List had had on him, and said he was now working as a waiter.
62. Under cross examination by Mr Wilkinson, DKS initially denied ever having been in room 12A with colleague SH on the night shift of 27-28 April 2020. He said SH had fabricated not only that he had mistreated DJ, but also that they had been in DJ's room together that night at all. He confirmed that his case was that colleagues SH, KG and AH had all lied in their statements to the police. When statements in the interview with resident DA relating to her use of her buzzer (see page 97 of the appeal bundle) were put to him, DKS said that she was also lying. He said that he didn't know why SH, KG, AH and DA would all lie about him. He then suggested that DA may not have lied but may instead have been confused as she suffered from Alzheimer's with dementia.
63. DKS clarified that the absence of any record in the night check chart of DJ being incontinent and covered in faeces did not necessarily mean that there was no episode of incontinence, but rather that DJ was not in that state when the 2-hourly checks were made. He said if there was an incident between checks that would be recorded in the care file notes, in the 'Statement of Wellbeing'.
64. After it was put to him that he had accepted at his disciplinary hearing that he had recorded that around 1am DJ had opened his bowels in a large amount and was "playing with it" (see pages 106-148, and in particular pages 110-111, of

the appeal bundle), DKS later accepted that DJ had experienced an episode of incontinence at some point on that night shift, when DJ was covered in faeces, and accepted that he had assisted him with that. He said he couldn't say whether he had assisted DJ alone or with a colleague.

65. When questioned about how DJ would require to be cleaned if he had produced a large amount of faeces, DJ accepted that it would take two members of staff, and when it was put to him that he had said in his evidence in chief that it would be impossible for one staff member to clean DJ while another changed his sheets or assisted him with his balance, he said it depended where DJ stood. He said it would be impossible if he were to stand right by his bed, but it was possible if he were to stand by the commode near the door.
66. Mr Wilkinson asked DKS, in light of Mr Hugheston-Robert's submission that DKS had been prevented from making full representations because of the risk that he might prejudice the criminal proceedings, whether he wished to say anything further now that the criminal proceedings were over. DKS said that he didn't "want to give that information".
67. While DKS at first denied entering DJ's room with SH shortly before 10pm, he accepted this when Mr Wilkinson put to him that the written representations prepared by his solicitors on his behalf (see pages 192-197 of the appeal bundle) said:

"Just before 10pm, DJ could be heard shouting from his room which is 12A. DKS and SH entered the room and found that DJ had soiled himself requiring a change of clothes for DJ and a change of bedclothes. It is here that DKS is alleged to have shouted and swore at DJ and covered his mouth with a duvet cover.

However, DKS denies this and states that he and SH, attended the room and cleaned and changed DJ and put him bac (sic) to bed without incident and entry in the night check book would have been made as to what happened."

68. DKS said that "from what [he] was reading" it "must be right" that he and SH had entered DJ's room shortly before 10pm, and that DJ had soiled himself and needed changing. He said that he would have cleaned and changed him, as "it would be abuse if I didn't". Under re-examination by Mr Hugheston-Roberts,

DKS said that this would have taken about half an hour. He said that it was common for staff to have to clean patients after episodes of incontinence.

69. In response to questioning from the panel DKS explained that the entries in the night check record would not necessarily have been made by the staff members who are recorded as having made the checks. He said that while he made the sequence of entries on page 387 of the appeal bundle in relation to rooms 1-15 around 10pm, either KG or SH would have made the next sequence of entries, and would have done so based on a note he would have written on a piece of paper showing when he went into which room and what the resident was doing at the time. Who actually completed the night check record depended, DKS said, simply on who picked up the record book.

Analysis

70. We were aware that while DKS's evidence was tested at the hearing, the DBS called no witnesses, so the evidence that the DBS relied upon from DKS's colleagues was untested and so was to be treated with caution.
71. Mr Hugheston-Roberts said that had the DBS placed DKS's name on the Adults' Barred List on an interim basis only, he would have no complaint, but it was wrong for the DBS to have made a final barring decision without having waited for the conclusion of the criminal proceedings.
72. This submission is misconceived because, unlike many professional regulators under their respective statutory regimes, the DBS has no power to make an interim order. It must make a binary decision whether to place the referred person's name on the relevant barred list(s) or not, and it must do so in accordance with the provisions of the SVGA. Should circumstances later change, or should new evidence emerge which indicate that it was mistaken in its barring decision, it is open to the DBS to review its barring decision and, if appropriate, to remove the person's name from the relevant list(s).
73. The DBS didn't hear any oral evidence. We had the benefit of hearing DKS's evidence tested under cross-examination. We were not impressed by him as a witness. DKS was initially adamant that he had not been in room 12A with SH on 27 April 2020. He then conceded, after his previous accounts were put to him, that he had been. He was equally insistent that it would have been

“impossible” for him and SH to have cleaned DJ and changed his bedding in room 12A together as SH had alleged due to space constraints, before having to accept that that would have been exactly what they did.

74. DKS’s case on mistake of fact was based on two main propositions:
- a. what was recorded (and what was not recorded) in the night check record and the ‘Statement of Wellbeing’ disproved the allegations; and
 - b. SH, KG, AH and DA all told lies about him for reasons unknown.
75. However, the evidence of the night check record and the ‘Statement of Wellbeing’ is only evidence of what was recorded in them. The entries are not necessarily complete, and they are not necessarily accurate. The records do not demonstrate that DJ didn’t have an episode of bowel incontinence around 10pm requiring him to be cleaned and his bedding changed, and they don’t demonstrate that DKS and SH couldn’t have been in room 12A around 10pm. Indeed, during the course of the hearing before us, DKS came to accept that these things happened just as SH had alleged.
76. As for the assertion that the evidence of SH, KG, AH and DA was “lies” (or, in the case of DA, possibly the result of confusion), we decided based on our assessment of DKS as a witness at the hearing before us that it was more likely that DKS’s evidence was untruthful, and he was motivated to give false evidence by his wish to have his name removed from the Adults’ Barred List so that he could resume his chosen profession.
77. While we acknowledge that the jury in the criminal trial was not persuaded so that it was “sure” that DKS did what was set out in the indictment, the DBS was entitled to make the findings that it made based on the evidence before it, and to make the Barring Decision based on those findings.
78. Further, based on the evidence that we heard, we are not persuaded that the DBS made any material mistake of fact.
79. Mr Hugheston-Roberts made robust submissions to the effect that DKS had been prevented from presenting an effective challenge to the case for his being barred due to the ongoing criminal proceedings, and that it was inappropriate for the DBS to make a final barring decision based on a “desktop audit” of the paper referral file only, without the benefit of oral evidence being tested at the criminal trial. However, the case which DKS advanced at the hearing was essentially the same as that which was set out in the written representations

made by Blackfords LLP on his behalf in response to the Minded to Bar letter, and DKS did not seek to introduce any transcript of the evidence in the criminal trial, or indeed any other significant new evidence, into these proceedings other than the night check logs and the ‘Statement of Wellbeing’ document, which we do not find to be probative of the matters in issue in this appeal for the reasons explained in paragraph 76 above. As such, even if its decision to proceed to a final decision without waiting for further evidence to become available did amount to a procedural irregularity, it could not have been material.

Conclusion

80. We therefore conclude that the decision of the DBS to place DKS’s name on the children’s barred list was not based on any mistake of fact and involved no mistake on any point of law. The appeal is dismissed, and the DBS’s decision is confirmed.

**Thomas Church
Judge of the Upper Tribunal**

**Ms Elizabeth Stuart-Cole
Member of the Upper Tribunal**

**Mr Matthew Turner
Member of the Upper Tribunal**

Authorised by the Judge for issue on 27 January 2025

