



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2022-001529-V
[2024] UKUT 396 (AAC)**

Between:

MMN

Appellant

- v -

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Citron, Ms Jacoby and Dr Stuart-Cole

Hearing date: 29 October 2024

Mode of hearing: CVP video hearing

Representation:

Appellant: by himself

Respondent: by Simon Lewis of counsel

The Upper Tribunal has made an order prohibiting the disclosure or publication of any matter that is likely to lead to the public identification of MMN and eight other individuals and institutions listed at page 125 of the Upper Tribunal bundle

SUMMARY OF DECISION**SAFEGUARDING VULNERABLE GROUPS (65.2)**

Safeguarding Vulnerable Groups Act 2006 – appellant included in adults’ barred list – appellant was agency support worker on shift in house with two vulnerable adults – DBS made factual findings that appellant had neglected the vulnerable adults in various ways, bent a finger back of one of them, and removed a skin graft from him – based on all the evidence, the Upper Tribunal found no mistake in DBS’s “neglect” finding, but (by a majority) found mistakes in DBS’s “finger bending” and “skin graft” findings – Upper Tribunal also found that all the factual findings were material to DBS’s decision – appeal allowed as DBS made mistakes in material facts – matter remitted to DBS for fresh decision – direction that appellant be kept on the list pending the new decision

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the Upper Tribunal follow.

DECISION

The decision of the Upper Tribunal is to **ALLOW** the appeal. The Respondent made a mistake in a finding of fact it made and on which its decision of 12 September 2022 (DBS reference DBS6191 00969733329) to include MMN in the adults' barred list was based. The Upper Tribunal **REMITTS** the matter to the Respondent for a new decision, which must be based on the findings of fact set out at paragraph 18 of the "Reasons" section below. The Upper Tribunal **DIRECTS** that MMN remains included in the adults' barred list until the Respondent makes its new decision.

REASONS FOR DECISION

This appeal

1. This is an appeal against the decision ("**DBS's decision**") of the Respondent ("**DBS**") dated 12 September 2022 to include MMN in the adults' barred list.
2. In general terms, the appeal concerns what, as a matter of fact, happened on Saturday 12 June 2021, when MMN (a man in his late 30s at the time) was working as an agency support worker with two particular vulnerable adults in a supported house where they lived. It was the first (and last) time MMN worked with those adults in that house.

DBS's decision

3. The decision was made under paragraph 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (the "**Act**"). This provides that DBS must include a person in the adults' barred list if
 - a. it is satisfied that the person has engaged in relevant conduct,
 - b. it has reason to believe that the person is, or has been, or might in the future be, engaged in regulated activity relating to vulnerable adults, and
 - c. it is satisfied that it is appropriate to include the person in the list.

4. Under paragraph 10, “relevant conduct” for the purposes of paragraph 3 includes conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult; and a person’s conduct “endangers” a vulnerable adult if he (amongst other things)
 - a. harms a vulnerable adult
 - b. causes a vulnerable adult to be harmed
 - c. puts a vulnerable adult at risk of harm or
 - d. attempts to harm a vulnerable adult.

5. The letter (“**DBS’s decision letter**”) conveying DBS’s decision found that:
 - a. on Saturday 12 June 2021, whilst working as a support worker, MMN
 - i. neglected to meet the basic care needs of VA1, a vulnerable service user (born in 1942), and VA2, another service user in the same shared accommodation (born in 1951), specifically in supporting them to change clothing and bedding, eat and drink (the “**neglect finding**”);
 - ii. exposed VA1 to physical and emotional harm when he bent his finger back (the “**finger bending finding**”); and
 - iii. exposed VA1 to physical and emotional harm when he removed a skin tag from his groin area (the “**skin tag finding**”);
 - b. MMN had demonstrated a lack of empathy for those in his care and an irresponsible and reckless pattern of behaviour, across a range of contexts, including the neglect of an 80 year old vulnerable adult’s basic care needs, the failure to accurately record medication issued, and a lack of responsibility for exposing this service user to physical harm when MMN bent his finger back and removed a skin tag from his groin area.

Jurisdiction of the Upper Tribunal

6. Section 4(2) of the Act confers a right of appeal to the Upper Tribunal against a decision by DBS under paragraph 3 of Schedule 3 (amongst other provisions) only on ground SW2 that DBS has made a mistake

- a. on any point of law;
 - b. in any finding of fact on which the decision was based.
7. The Act says 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” (section 4(3)).
 8. Permission to appeal was given by the Upper Tribunal (Judge Citron) in a decision issued on 27 October 2023. The permission decision stated that MMN had indicated that, if permission to appeal were given, he would give oral evidence at the substantive hearing to the effect that he took good care of VA1 and VA2 (the “VAs”) on that day; he did not bend back VA1’s finger; and he did not remove a skin tag from the groin area of VA1.

Documentary evidence in the Upper Tribunal bundle

9. In addition to DBS’s decision letter, evidence in the bundle of 157 pages included:
 - a. a 1-page typed statement in the name of SW1, the support worker who took over from MMN late in the evening on Saturday 12 June 2021; it was undated (on its face) but appears to have been written the next day, Sunday 13 June 2021; this said, amongst other things, that
 - i. SW1 arrived on her shift at 9.50 pm
 - ii. VA2 was in day clothes when SW1 arrived; there was no bedding on his bed; he told SW1 that he not had tea or anything to eat, that VA1 had not been allowed out of his room, and that MMN was very mean
 - iii. VA1’s room smelled sweaty; VA1 told SW1 that he said he not had a shower, had been in pyjamas for the day, had had no food, and had been in his room all day
 - iv. upon checking the medication, SW1 found that all medication that should be given was not in the pack; but only the foot cream (for both VAs) had been signed for
 - v. SW1 reassured the VAs, both on the Saturday evening and on Sunday, that MMN would not be back in the house, as the VAs were both not happy with him going back

- b. a 1-page typed statement in the name of SW2, a support worker who was on shift at the house two days later, on Monday 14 June 2021; the document was dated Tuesday 15 June 2021; this said, amongst other things, that
- i. VA2 spoke to SW2 about MMN's shift on the Saturday; VA2 said that MMN was not very nice; that he had made VA1 stay in his room all day; that VA1 had nothing to eat throughout the whole day; that VA2 stayed in his room most of the day but came down and got VA1 a packet of crisps but that MMN "played hell" with him;
 - ii. VA1 then joined the conversation that VA2 was having with SW2 and said that "the man" (by which he meant MMN) had bent his finger back; SW2 checked VA1's fingers for obvious signs of injury but found none; VA1 also told SW2 that MMN had ripped up a picture at the side of his bed of a previous staff member;
 - iii. VA2 told SW2 that neither he nor VA1 had eaten that day; they had waited for SW1 to come in at 10 pm to get something to eat;
 - iv. SW2 stated that the VAs need a lot of reassurance that MMN would not come back to work there again;
- c. a 1-page typed statement in the name of TL, the team leader, who was at the house on Tuesday 15 June 2021, and dated that date: this said, amongst other things, that
- i. VA1 told him that MMN had bent VA1's finger back, that VA1 had not had any lunch or dinner, and had not been supported with his personal care that morning, so he stayed in his room all day; these things were said by VA1 "in a loop throughout the day"
 - ii. VA1 was very anxious that MMN would be coming back to the service
 - iii. when TL discussed VA1 with VA2, VA2 said that he had tried to bring crisps up to VA1, but MMN had shouted and "played hell" with VA2

- iv. VA1 then told TL that MMN had threatened to “cut him down below with a knife – MMN pointed to his groin area. VA1 said he was bleeding but it had now stopped. TL stated that on taking a look at the area VA1 was pointing to, it was evident that one of his skin tags had been removed. TL records that VA1 stated that MMN had cut it off with a knife
 - v. VA1 told TL that MMN ate all of his food; both VAs talked about MMN making toast with their bread, trying to drink the cans of coke from the cupboard, eating the Jaffa cakes and drinking the coffee machine capsules
 - vi. VA1 showed signs of heightened anxiety that day (Tuesday 15 June) around MMN and what had happened to him; VA1 asked over and over if MMN would be coming back to the service;
- d. a 7-page witness statement on form MG11(W) (for criminal justice related purposes), seemingly of SW1, dated 26 July 2021; this was largely consistent with SW1’s earlier 1-page statement; in addition, it says, amongst other things, that
- i. SW1 worked one weekend day a week at the house as support worker for the VAs
 - ii. SW1 was due to start work on the Saturday in question at 10 pm but arrived a few minutes early
 - iii. VA1 told SW1 on the Saturday night that MMN had bent his finger back
 - iv. VA1 did not tell SW1 about his skin tags being cut; but SW1 described VA1 as quiet and sheepish in the shower on the Sunday morning;
- e. a 5-page witness statement on form MG11(W) (for criminal justice related purposes), seemingly of TL, dated 8 August 2021; this was largely consistent with TL’s earlier 1-page statement; in addition, it says, amongst other things, that
- i. he was the team leader and had been there for three years

- ii. TL would describe VA1 as generally jolly and happy and generally easy to look after; VA2 was a little more complex but more aware of his surroundings, and had more capacity than VA1; TL would say that both VA1 and VA2 had capacity for their own decisions and good memory; TL stated that when either VA1 or VA2 say something has happened, there is some element of truth to it; TL said that, after three years with the VAs, he was able to identify when either of them was recalling something accurately, as opposed to making something up;
 - iii. VA1 had never (prior to the incident in question) had any skin tags removed; should he need on removed, he would first have to see a GP and a specialist;
 - iv. TL asked VA1 to show him the knife used by MMN to remove the skin tag; VA1 brought him a pair of black handled scissors; TL took it that when VA1 said knife, he meant scissors;
- f. the DBS referral form completed by the organisation in charge of the house where the VAs lived, which, amongst other things,
- i. described MMN as “support worker – agency”
 - ii. described VA1 as: having a learning disability; independently mobile in the home environment; a very trusting person, which can put him at risk; he had a support worker available for him from 7 am to 10 pm in the house; he also had a sleep-in support worker between those hours; he required support to prompt and encourage him with daily living tasks, washing and drying himself, support with shaving; he was able to physically dress himself and chose what he wanted to wear on that day; he required support taking his medication; he was usually a very happy person;
- g. photographs of VA1’s skin tags;
- h. letter from Cheshire Constabulary to DBS dated 25 February 2022;
- i. MMN’s representations to DBS;
- j. DBS’s barring decision summary; this showed, amongst other things

- i. definite concerns under the 'callousness/lack of empathy' heading; the facts referred to were: leaving VA1 in his pyjamas, in his bedroom all day, without food or drink; bending VA1's finger back; cutting a skin tag off VA1's groin area, with no after-care; and no evidence of remorse for, or insight into, behaviour;
- ii. definite concerns under the 'irresponsible and reckless' heading; the facts referred to were: failure to accurately record medication given; not acknowledging responsibility for behaviour and neglecting the personal needs and basic needs of the VAs.

The Upper Tribunal hearing

10. MMN attended the hearing, as did Mr Lewis representing DBS. We are grateful to them both, for presenting their respective arguments clearly.
11. MMN, representing himself, also gave evidence at the hearing, including via cross examination and answering questions from the panel. The panel also heard evidence from MMN's wife, RN.
12. The "permission" hearing had been held "face to face" in Manchester; during the process of listing the full hearing, the Upper Tribunal listings team informed MMN that a hearing could be listed earlier if listed in London, or on the CVP video platform; MMN requested that one of these modes of hearing be pursued; DBS expressed a preference for a face to face hearing; however, because a panel of the Upper Tribunal could be convened significantly earlier if the hearing was on the CVP video platform, the hearing was ultimately listed in that format. In the event, the panel was satisfied that both parties participated in the CVP hearing on 29 October 2024 fully, fairly and justly.

MMN's case

13. MMN's evidence was that none of the things in DBS's findings had occurred. He gave a quite detailed account of what happened on his shift in the house on the Saturday in question, which did not include anything untoward. MMN's posited that the VAs had not told SW1, SW2 and TL (the "**SWs**") the things reported in the SWs' documentary evidence; he argued that the SWs had made up ("fabricated") these reports of what the VAs had told them. MMN did not know why the SWs had done this - he speculated that SW1 was cross with him for reporting to "on call" that she was "late" for the shift (according to MMN, SW1 had

been due to arrive at 8 pm but only arrived at 8.30 pm, after MMN reported that SW1 had not arrived on time); and that SW2 and TL (whom he had never met) were supporting SW1; but MMN accepted that he did not really “know” why the SWs would fabricate things.

14. On the finding by DBS (based on SW1’s evidence) that MMN had not signed for the medication given to the vulnerable adults, MMN observed that it would have been odd of him to “sign” for the foot medicine but not the other medication; he speculated that perhaps the other medication has been given before he went on shift; he also questioned why medication records were not produced in evidence by DBS.
15. RN had no direct knowledge of the events at the house on the Saturday in question; she recalled MMN saying that it had been a good shift and that the support worker to relieve him had arrived late.

DBS’s case

16. DBS maintained that there had been no factual or legal mistakes in its decision. DBS did argue, in the alternative, that even if the finger bending and skin tag findings were mistaken, that would not be material, given the nature of the neglect finding.

Our analysis of the evidence

17. We analyse the evidence as follows, on the balance of probabilities:
 - a. the accounts by the SWs of what the VAs said to them are accurate; they were not fabricated; it seems to us unlikely that the SWs would have invented these accounts of what the VAs told them, out of some kind of animus on SW1’s part against MMN, in which SW2 and TL participated, given that none of the SWs had even met MMN (apart from SW1, who met him briefly on the Saturday night in question); we are not persuaded by MMN’s speculation that perhaps it was his phoning “on call” to say that SW1 was late, that triggered SW1 to fabricate an account of what the VAs told her, that was then reproduced by the accounts by SW2 and TL of what the VAs told them, respectively;
 - b. we are of the same view, for the same reason, of SW1’s evidence that medication had been issued to the VAs without it being signed for i.e. we

think SW1's account is accurate; and it seems to us probable that it was MMN who issued the medication to the VAs, but did not sign for it;

- c. the question, as regards the neglect, finger bending, and skin tag findings – all of which are based on accounts by the VAs, as relayed to the SWs – is whether what the VAs reported to the SWs, as to what happened on the Saturday in question, is accurate (balanced against MMN's evidence, denying it);
- d. the SWs, who knew the VAs, found the VAs to be reliable in their reporting; this gives some weight to the VAs' account (although we were not able to test the SWs on why they considered the VAs to be reliable on the particular matters in this case);
- e. we note that the neglect finding is supported by what the VAs told all three SWs, including what was told to SW1 immediately after MMN's shift ended on the Saturday night;
- f. in contrast, the finger bending and skin tag findings are not supported by what was said to SW1, according to SW1's near-contemporaneous account – they are not mentioned in that account. The first evidence supporting the finger bending finding is what was said by the VAs to SW2 on the following Monday (two days after the event) (although we note that SW1's witness statement, made at the end of July, includes the finger bending as part of VA1's account to SW1); the first evidence supporting the skin tag finding is what was said by the VAs to TL on the following Tuesday (three days after the event);
- g. whilst the panel is unanimous that the neglect finding was not mistaken, given that it records what was said by the VAs immediately after MMN's shift, we have not been able to reach a unanimous view on the finger bending and skin tag findings: in the view of the majority (Judge Citron and Ms Jacoby), the evidence supporting these findings is significantly weaker, as they are not mentioned in SW1's near-contemporaneous account of what the VAs told her on the Saturday night; in the view of the majority, it is unlikely that the VAs would have overlooked to tell SW1 about the finger bending and skin tags, or that SW1 would have overlooked to record it in her near-contemporaneous evidence; it is more likely that these particular accounts emerged, unsupported, as the story was repeated and amplified over the following two to three days; in

making this finding, the majority take account of all the evidence before them, including (i) that VA1 had learning disabilities, (ii) that the SWs, who knew the VAs, thought their accounts were reliable, (iii) that the VAs' account changed somewhat over the days following the Saturday in question, and (iv) that there was no objective evidence of the finger-bending (such as damage to VA1's fingers) or skin tag removal (such as blood stains);

- h. Dr Stuart-Cole balances the evidence differently, according more weight to the VAs' accounts in the days following the incident, and so finds it more likely that the finger bending and skin tag findings are not mistaken;
- i. given this split in the panel's views, we considered whether the finger bending and skin tag findings were *material* to DBS's decision; we decided that they were, given the way DBS's decision letter and DBS's "barring decision summary" are expressed (in that they consistently interlace the finger bending and skin tag findings with the neglect finding in explaining the basis for DBS's decision).

Findings of fact by the Upper Tribunal

18. Based on the analysis above, and consonant with regulation 8 First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (the decision of the majority is the decision of the Upper Tribunal), these are the Upper Tribunal's findings of fact:

- a. the neglect finding (as set out above)
- b. on the Saturday in question, MMN
 - i. did not bend VA1's finger back
 - ii. did not remove a skin tag from VA1
 - iii. administered some medication to the VAs without signing for it in the records.

Remittal to DBS for a new decision

19. The Upper Tribunal has found mistakes in findings of fact on which DBS's decision was based. The question is whether we should direct DBS to remove MMN from the list, or remit the matter to DBS for a new decision. Applying the

test in *DBS v AB* [2021] EWCA Civ 1575 at [73], this does not seem to us a case where the *only* decision DBS could lawfully reach in the light of the law and the facts as found by the Upper Tribunal, would be to remove MMN from the barred list. DBS is the arbiter of “appropriateness” of listing and in our view it is now for it to make a new decision as to whether it is appropriate to include MMN in the adults’ barred list, given the findings of fact which the Upper Tribunal has made. We are therefore remitting the matter to DBS for a new decision.

20. For similar reasons, it seems to us fair and just in this case that MMN remain included in the adults’ barred list, pending DBS’s new decision: as we have said, it is for DBS to consider the appropriateness of keeping MMN in the list in the light of the facts found by the Upper Tribunal; and it would be in no one’s interests, we feel, to direct MMN’s removal, only to have him re-included upon a new decision by DBS. We trust that DBS will make the new decision as soon as it reasonably can.

Zachary Citron
Judge of the Upper Tribunal

Suzanna Jacoby
Dr Elizabeth Stuart-Cole
Members of the Upper Tribunal

Authorised by the Judge for issue on 4 December 2024