IN THE UPPER TRIBUNAL **UA-2022-001330-V**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 432 (AAC)**

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008
(statutory instrument number 2008/2698)

Appellant:	**CC**
Respondent:	**Disclosure and Barring Service (ref: 00974292011)**
DBS decision letter date:	**8 July 2022**
Upper Tribunal appeal decision date:	**16 January 2024**

APPELLANT'S COSTS APPLICATION
01 November 2024

Introduction

1. This is a costs application against the DBS by the appellant after the determination of the appeal brought under section 4 of the Safeguarding Vulnerable Groups Act 2006 dated 16 January 2024. The final decision was to allow the appeal and remit the case for the DBS to make a new decision.

2. The appellant's case is that the DBS or its representative have acted unreasonably, and accordingly the Upper Tribunal should award costs under Rule 10(3)(d). The application was made on 4 April 2024, one week before the 11 April 2024 deadline. The DBS oppose the costs application and asked for it to be considered at a hearing by video and I decided that the hearing should be held and by video.

3. The Law

4. Composition of the Tribunal for this application.

5. This application was decided by me without the two other members who sat on the substantive case. The reason for this is set out here.

6. The composition of the tribunal which heard this costs application is governed by the Practice Statement for "Composition of tribunals in relation to matters that fall to be decided by the Administrative Appeals Chamber of the Upper Tribunal on or after 26th March 2014".

7. Paragraph 3 of the Practice Statement provides, so far as relevant (my emphasis)–

> "3. In accordance with articles 3 and 4 of the 2008 Order, any matter that falls to be decided by the Administrative Appeals Chamber of the Upper Tribunal is to be decided by one judge of the Upper Tribunal (or by a Registrar if the Senior President of Tribunals has approved that they may decide the matter) except that –
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> b. where the matter is the determination of an appeal brought under section 4 of the Safeguarding Vulnerable Groups Act 2006 (otherwise than by the striking out of the appeal under rule 8(2) or (3)(a) or (b) of the 2008 Rules), the matter is to be decided by – i. one judge and two other members of the Upper Tribunal; or ii. where the Senior President of Tribunals or Chamber President considers that the matter involves a question of law of special difficulty or an important point of principle or practice, or that it is otherwise appropriate, two judges and one other member of the Upper Tribunal.".

8. Paragraph 10 of the Practice Statement provides (my emphasis)–

> "10. Where the Upper Tribunal has given a decision that disposes of proceedings ("the substantive decision"), any matter decided under, or in accordance with, rule 5(3)(l) or Part 7 of the 2008 Rules or section 10 of the 2007 Act must be decided by the same member or members of the Upper Tribunal as gave the substantive decision.".

9. This costs application is not an appeal, so does not fall within paragraph 3b of the Practice Statement.

10. The costs application is decided under rule 10, and not rule 5(3)(l) (suspension of decision pending appeal or review), or Part 7 of the rules (which contains rules 41 to 48) or section 10 (reviews). The application does not therefore fall within paragraph 10 of the Practice Statement either. Nor does it fall within any part of the Practice Statement other than paragraph 3.

11. This means that it falls within the opening words of paragraph 3 of the Practice Statement, requiring it to be decided by one judge of the Upper Tribunal. That is why the members who sat on the appeal to which this costs application relates did not hear the costs application with me.

12. The procedural rules relevant to the application for costs

13. It was agreed by both parties that the relevant Rule applicable to this application was Rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which regulates costs for hearings before the Upper Tribunal.

> *10(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except— …*

(d)if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings; ...

14. Relevant case law

15. I was referred to *Thapa v Entry Clearance Officer* [2018] UKUT 54 (IAC) Lane J, as the Tribunal case which gave guidance on the application of Rule 10 (3) (d). The UT discussed the following at para 25:

> In Cancino *(costs – First-tier Tribunal – new powers) [2015] UKFTT 00059 (IAC)*, the then President of the Immigration and Asylum Chamber of the Upper Tribunal, sitting in the First-tier Tribunal with the President of the Immigration and Asylum Chamber of that Tribunal, gave guidance on the issue of costs, including rule 10(2)(b) of the 2008 Rules (which corresponds with rule 9(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014). In *Cancino* , the Tribunal drew upon a number of judgments of the Court of Appeal, including *Ridehalgh v Horsefield [1994] Ch 205* . At [232] in that case, the Court held that the word "unreasonable" was such as aptly to describe – "… conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment but it is not unreasonable."

16. The Upper Tribunal say at para 28:

> "What emerges from Cancino is that the power to award costs under rule 10 of the 2008 Rules (or rule 9 of the 2014 Rules) is to be exercised with significant restraint. In particular, the parties and their representatives must realise that these powers are of a fundamentally different character from the procedural provisions and practices found in the courts and some tribunals, whereby costs regularly "follow the event"; in other words, where a successful party will normally be awarded his or her costs."

17. For a description of the role of the DBS I was referred to *R (on the application of SXM)* v *DBS* [2020] EWHC 624 (Admin). This was a case where the issue was disclosure of information to the victim of the person the DBS was considering barring so it was not considering costs as I am in this case. Nevertheless it provides a useful observation on the function of the DBS and at para 12 it says: "the function of DBS is a protective forward-looking function, intended to prevent the risk of harm to children by excluding persons from involvement in regulated activities, DBS is not performing a prosecutorial or adjudicatory role".

18. The analysis

19. I have decided to refuse the application for costs for the following reasons.

20. The appellant's case is that the DBS acted unreasonably by relying on the evidence before them and barring the appellant. The appellant through his Counsel says that the allegation was made by a single complainant who said that she had seen the appellant masturbating in a car parked in a public place and was not good evidence. The Tribunal notes she said she had seen this on 10 occasions. That was the information available to the DBS from the police and as such they needed to consider it.

21. The DBS decided to bar the appellant and it later came to light that the appellant accepted a caution for public nuisance rather than an offence of outraging public decency as the DBS had believed. In 2023 when the police records were examined the error came to light and the caution was removed. The appellant says at this stage the DBS should have reviewed their decision and made a different decision. The DBS did not do that. At the final hearing of the appeal both Counsel agreed that the main issue to be determined was the issue of fact i.e. had the appellant behaved in the way described by the complainant.

22. At the oral permission hearing permission was granted. In terms of mistake of fact, which the Tribunal panel ultimately decided had occurred, the UTJ Hemingway set out set out as follows;

> *"4. On one view it might seem unlikely that he would, if his condition in 2013 was so serious as to necessitate him having to air his private parts in a public area (albeit in his car), not consult his GP. I note that he says he was self-medicating instead, but it may be thought that, absent any evidence of any phobia about seeing medical practitioners, and there is no such evidence here, the desire to avoid exposing himself in the way he describes would be a powerful imperative to take medical advice. Further, it might be thought that even failing that, more extensive use of the lavatorial facilities in his place of work notwithstanding the concerns he and others have explained, would have been seen as a better prospect than doing what he says he actually did in order to deal with the problem he says he was facing. Further still, there is no contemporaneous medical evidence at all and there is currently no other medical evidence which suggests the two mooted conditions (dhobie itch and intertrigo) would be capable of causing the appellant to take the drastic action he describes. And, of course, he accepted a caution.*
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> *5. On the other hand, the evidence relied upon by the DBS for its factual finding might, on one view, be regarded as thin. The DBS has a written summary from the police. But, although it appears the appellant was interviewed, there is no interview record before me. Whilst the complainant would have given a statement to the police, no copy of the*

statement has been sent to the DBS or has been placed in front of me. I am told those acting for the appellant have sought the record of interview and statement but without success and that the police have indicated they are not prepared to produce the statement (though it seems they have one) due to data-protection reasons. It is possible the DBS has been told the same. I am not criticising the DBS for not having been able to obtain more robust evidence but if the evidence as it is, is to be perceived as thin, that increases the chances of it being outweighed during the course of an appeal by other evidence. That is relevant to my assessment as to realistic prospects of success. Further, whilst the acceptance of a caution has significance, I am not sure, on the material and argument produced thus far, that it amounts to an acceptance that matters occurred in the way the DBS has found they did. In particular, the appellant exposing himself in the way he describes might arguably be sufficient to establish the common law offence for which the caution was received. Further still, there is some material in the report of Dr Tonks which might suggest the appellant is unlikely to have deliberately masturbated in public though the relevant incidents occurred long before Dr Tonks met the appellant."

23. As set out above there were competing considerations as to the mistake of fact ground in that there were questions around the appellant's explanation but also that the evidence in front of the DBS might be regarded as "thin". These competing considerations after an oral hearing which led to the grant of permission needed to be tested in a full hearing. Permission was given so that the case could be considered by a full panel.

24. The second issue set out in the decision giving permission was should the DBS have made the decision before receiving the psychiatric evidence on risk from the appellant. This was, in my view, relevant to a decision on proportionality had the Tribunal found no mistake of fact was made. The Tribunal found there was a mistake of fact and did not go onto consider proportionality. There are no findings on proportionality that assist the appellant in his application for costs. The report of Dr Tonks was not referred to in the findings of the Tribunal who sat on the appeal hearing.

25. The third issue raised at the permission hearing was even if there was no mistake of fact the outcome reached was disproportionate given the effect on the appellant, the length of time since the allegations were made which was 10 years before and no further "troubling incidents"(para 7 of the permission decision). Again, the Tribunal found there was a mistake of fact and did not consider proportionality.

26. At the final hearing the Tribunal agreed with Counsel that the issue before the Tribunal was whether the DBS had made a mistake of fact. This was recorded at para 25 of the decision. *"25. The parties agree that the issue before the tribunal is whether the DBS made a mistake of fact in coming to the conclusion that the appellant masturbated in his car*."

27. In our final paragraph we said;

> *"34. We find as a fact on the evidence available to us that the appellant did not masturbate in his car. He was applying cream to a rash and had no intention of anyone seeing him. We therefore find the DBS has made a mistake of fact. Given this we remit the case to the DBS to make a new decision. We did not go on to consider disproportionality given we found a mistake of fact."*

28. I also take into account when considering the reasonableness of the DBS's approach their statutory duty and function. The useful description of this is SXM para 12 that "the function of DBS is a protective forward-looking function, intended to prevent the risk of harm to children by excluding persons from involvement in regulated activities, DBS is not performing a prosecutorial or adjudicatory role". Given their protective forward looking function that is intended to prevent the risk of harm to children (and vulnerable adults) I do not find that the DBS has behaved unreasonably as required by rule 10(3)(d) in defending the appeal. The information before the DBS was that the appellant has masturbated in the car on 10 separate occasions whilst looking at the complainant. Given they are the body tasked with protecting children and vulnerable witnesses, the decision to bar was within their power on that information. The Tribunal heard further evidence from the appellant and found the facts as set out in that decision.

29. Applying the acid test from Cancino the conduct of the DBS permits a reasonable explanation. On the information before them they believed the appellant did masturbate in the car and therefore included him on the barred lists.

30. Taking into account the guidance in *Thapa* that the power to award costs in the Upper Tribunal should be exercised with significant restraint this was not a case where it was clear all along what the result would be. There were arguments on both sides with the appellant eventually being successful in his appeal.

31. I therefore decide the application for costs is dismissed.

Sarah Johnston
Sitting as a Judge of the Upper Tribunal
16/12/2024