# THE UPPER TRIBUNAL
# (ADMINISTRATIVE APPEALS CHAMBER)

## UPPER TRIBUNAL CASE NO: UA-2022-001284-V
## [2024] UKUT 61 (AAC)
## MSB V DISCLOSURE AND BARRING SERVICE

**THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:**

**No one shall publish or reveal the name or address of any of the following:**

**(a) MSB, who is the Appellant in these proceedings;**

**(b) any of the other persons identified by initials in this decision;**

**or any information that would be likely to lead to the identification of any of them or any member of their families in connection with these proceedings.**

**Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.**

Decided following an oral hearing on 5 July 2023

**Representatives**

| | |
|---|---|
| Appellant | Laura Bayley of counsel, instructed by Stephensons Solicitors LLP |
| Disclosure and Barring Service | Bronia Hartley of counsel, instructed by DLA Piper UK LLP |

## DECISION OF THE UPPER TRIBUNAL

On appeal from the Disclosure and Barring Service (DBS from now on)

DBS Reference: 00959481352
Decision letter: 24 June 2022

This decision is given under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA from now on):

As DBS made mistakes in the findings of fact on which its decision was based, the Upper Tribunal, pursuant to section 4(6)(a) of SVGA, directs DBS to remove the appellant from both barred lists.

# REASONS FOR DECISION

## A. The decision to include MSB in the barred lists

1. On 24 June 2022, DBS included MSB in both the children's barred list and the adults' barred list on the basis of these findings of fact:

- On dates prior to 25 May 2021, whilst registered as a child-minder, you failed to notify Ofsted of critical concerns regards household members, denying Ofsted the opportunity to adequately risk assess and safeguard the children in your care.
- On dates prior to 22 November 2012, whilst registered as a child-minder, you failed to notify Ofsted of your husband MB receiving a Conditional Discharge on 08 February 2012, for Battery against his 16yr old son.

At the beginning of the hearing, we asked Ms Hartley to clarify exactly what those related to. She told us that the first finding related to allegations of rape against MSB's son in 2018 and 2020, and that the second finding related to events leading to the 2012 incident between MB, who is now MSB's husband, and his son.

2. DBS had listed other matters in its Minded to Bar letter, but found that they had not been substantiated.

## B. The legal basis for the decision

3. The letter notifying MSB of the decision stated that the decision had been made 'using our barring powers as defined in … the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007'. In fact, the decision was made under the powers conferred by paragraphs 3 and 9 of Schedule 3 SVGA. Paragraph 3 refers to children; paragraph 9 refers to vulnerable adults.

## C. The appeal to the Upper Tribunal

4. Upper Tribunal Judge Gray gave MSB permission to appeal to the Upper Tribunal on 17 February 2022. She wrote that: 'I find the grounds of appeal are arguable both in relation to mistake of fact and error of law.' Those grounds are at page 32. They were settled by Ms Bayley and covered, as Judge Gray said, a number of matters of fact and law. The Court of Appeal has decided in *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982 at [97] that the scope of the appeal is limited to the grant of permission. As we have decided the case on matters of fact, we do not need to consider the matters of law in the grounds.

5. Judge Gray directed a hearing, which took place on 5 July 2023 before Upper Tribunal Judge Jacobs and specialist members. We refer to what the Upper Tribunal said about the members' qualifications for appointment in *CM v Disclosure and Barring Service* [2015] UKUT 707 (AAC) at [59] to [64]. We relied on the members' experience and understanding of safeguarding in questioning MSB, assessing the evidence and making our decision.

*After the hearing – submissions on disposal*

6. Having heard the case, we decided that DBS had made mistakes of fact. That raised the issue of how we should dispose of the appeal. We made a direction to DBS on 16 July 2023:

1. This direction is issued to allow DBS to comment on possible disposal in the light of our findings of fact. We allow one month from the date when this direction is issued.

2. When we have received and considered DBS's response, we will decide whether it is necessary to hear further from MSB.

3. We have found that on dates prior to 22 November 2012, whilst registered as a child-minder, MSB failed to notify Ofsted that her husband MB had received a Conditional Discharge on 08 February 2012, for Battery against his 18 year old son. We have found that she did not minimise what happened.

4. Otherwise, we find that the other allegations in DBS's final decision letter are not proven.

5. On the basis that the finding we have made amounts to or involves relevant conduct, the issue arises of disposal. Should the case be remitted to DBS or should we direct DBS to remove MSB from the lists, bearing in mind that there is only one allegation proven, shortly after she set up in business, for which Ofsted gave her a warning, and there has been no repetition?

7. Ms Hartley replied on behalf of DBS on 10 September 2023. She reminded us that we are bound by the decision of the Court of Appeal in *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575. These were her submissions:

SUBMISSIONS

8. One of the allegations upon which the Respondent's decision was based remains proved.

9. Per paragraphs 3 and 9 of Schedule 3 to the 2006 Act, the Respondent must include a person in the CBL/ABL if: (i) DBS is satisfied that the person engaged in relevant conduct, (ii) DBS has reason to believe that the person is, or might in the future, be engaged in regulated activity relating to children/vulnerable adults; and (iii) DBS is satisfied that it is appropriate to include the person on the list.

10. As such, the Respondent would be obliged to include the Appellant in the CBL/ABL subject to it being satisfied that it is appropriate to do so and inclusion not being a disproportionate interference with the Appellant's Article 8 rights.

11. This means it is not clear that the only decision that the Respondent could lawfully come to is removal.

Appropriateness

12. Per paragraph [72] of AB:

a. the Upper Tribunal should not be deciding the question of appropriateness when deciding on the appropriate disposal under section 4(6) of the Act; and

b. if there is a question of whether it is appropriate to include a person's name on a barred list, the appropriate action under section 4(6) of the Act would be to remit the matter to the DBS so that it can decide the issue of appropriateness.

13. Directing removal would necessarily require the Upper Tribunal to speculate as to what the Respondent's assessment of appropriateness may be on remittal, i.e., the Upper Tribunal would be considering the appropriateness of barring, which it is not permitted to do.

14. The situation at hand is analogous to the example given in paragraph [73] of AB of when a matter should be remitted:

> 73. For those reasons, I would interpret section 4(6) of the Act as permitting the Upper Tribunal to direct removal of the name of a person from a barred list where that is the only decision that the DBS could lawfully reach in the light of the law and the facts as found by the Upper Tribunal. It is not difficult to think of examples where that might be appropriate. The DBS may have considered that a person had been found to have engaged in sexually inappropriate conduct on one occasion with a child. *If, on the facts, it transpired that the conduct had not in fact occurred (or the respondent had wrongly been identified as the person responsible) and the person had not been guilty of the conduct, there would be no basis for including that person in a barred list and the Upper Tribunal could direct removal. By contrast, if the person were thought to have committed sexually inappropriate conduct with two children, but the Upper Tribunal decided on the facts that the person was responsible for one but not the second act of inappropriate conduct, the question of whether it would be appropriate to include the person on the children's barred list because of that one act would raise a question of appropriateness. The matter should then be remitted for the DBS to take a new decision based on the facts as found.* The interpretation that I consider to be correct is therefore both workable and reflects the essential elements of the statutory scheme.

Proportionality

15. Given that conduct that merited a warning by Ofsted remains proved, and having regard to the demanding threshold to be met before a decision could be said to be irrational or disproportionate, it cannot be said that there is no lawful decision open to the Respondent other than removal on the basis of the remaining conduct. Put differently, it could not be said that the remaining conduct is so de minimus that barring on the basis of the same would be necessarily disproportionate.

16. The Respondent respectfully submits that in the above circumstances the correct approach is for the matter to be remitted to the Respondent for a fresh decision.

8. Having considered Ms Hartley's submission, we allowed MSB's representatives to respond. The response came from her solicitors, who wrote on 10 November 2023:

> While the Appellant does not propose to submit further detailed representations in respect of the case at this stage given the significant legal expenses she has incurred already, the Tribunal are invited to take into consideration the submissions previously submitted on her behalf in respect of proportionality.
>
> This ground of appeal, that the Respondent came to a decision which was, in the circumstances, disproportionate, is addressed in the Notice and Grounds of

Appeal, paras 67 to 69 [p31], within the further submissions at paras 6 to 12 and the skeleton argument at paras 16-18. The Upper Tribunal is invited to consider this ground of appeal and give judgment upon it, in light of your findings of fact.

The Tribunal are thereafter invited to direct the removal of the Appellant from both barred lists as it is submitted it would be disproportionate for the Appellant to be included on either barred list given the findings made by the Tribunal.

*After the hearing – decisions of the Court of Appeal*

9. When we heard the case and when we made our findings, we followed the approach of the Presidential Panel of the Upper Tribunal in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC). On 17 August 2023, after we had made our findings, the Court of Appeal decided *JHB*. That case suggested that the Upper Tribunal's jurisdiction over mistakes of fact was more limited than we had understood.

10. On 2 December 2023, shortly after MSB's solicitors replied to our direction on disposal, the Court of Appeal decided *Kihembo v Disclosure and Barring Service* [2023] EWCA Civ 1547. The Court confirmed at [26] that *JHB* had approved the Upper Tribunal's decision in *PF*. That left the law in a state of uncertainty.

11. There was, though, another case awaiting hearing in the Court of Appeal: *Disclosure and Barring Service v RI* [2024] EWCA Civ 95. The Court heard DBS's appeal on 1 February 2024 and dismissed it with reasons to follow. Those reasons were given on 9 February 2024. The Court confirmed the approach set out in *PF*. It decided that *JHB* only applied if the Upper Tribunal had not heard evidence from the appellant. The Upper Tribunal is entitled to hear evidence, as accepted in *JHB* at [95].

12. In this case, we heard evidence from MSB and explain what we made of her evidence later.

## D. The legislation

*The barring provisions*

13. We set out the provisions of Schedule 3 SVGA relating to children; those relating to vulnerable adults are essentially the same. Paragraph 11 is the equivalent for vulnerable adults.

*Behaviour*

**Paragraph 3**

(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.

(4) This paragraph does not apply to a person if the relevant conduct consists only of an offence committed against a child before the commencement of section 2 and the court, having considered whether to make a disqualification order, decided not to.

(5) In sub-paragraph (4)–

(a) the reference to an offence committed against a child must be construed in accordance with Part 2 of the Criminal Justice and Court Services Act 2000;

(b) a disqualification order is an order under section 28, 29 or 29A of that Act.

**Paragraph 4**

(1) For the purposes of paragraph 3 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;

(c) conduct involving sexual material relating to children (including possession of such material);

(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;

(e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate.

(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.

(3) 'Sexual material relating to children' means–

(a) indecent images of children, or

(b) material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification.

(4) 'Image' means an image produced by any means, whether of a real or imaginary subject.

(5) A person does not engage in relevant conduct merely by committing an offence prescribed for the purposes of this sub-paragraph.

(6) For the purposes of sub-paragraph (1)(d) and (e), DBS must have regard to guidance issued by the Secretary of State as to conduct which is inappropriate.

*The appeal provisions*

14. Section 4 SVGA contains the Upper Tribunal's jurisdiction and powers.

**4 Appeals**

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

…

(b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;

(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 DBS has made a mistake of law or fact, it must confirm the decision of DBS.

(6) If the Upper Tribunal finds that DBS has made such a mistake it must–

(a) direct DBS to remove the person from the list, or

(b) remit the matter to DBS for a new decision.

(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)–

(a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and

(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.

…

## E. Failure to report

15. By way of background, MSB worked as a nanny when she left college and set up her business as a childminder in September 2011. Ofsted was the regulator. The business was run from a converted annex to her home, which was constructed to be entirely separate from the family accommodation. She is now married to MB. Both had difficult separations from their former partners, who made allegations against them.

16. Both of DBS's findings involve failures by MSB to notify Ofsted. DBS did not identify the relevant regulations that imposed the duty to notify. This omission is surprising. We are grateful to Ms Bayley for her research and submissions, which we accept.

17. Ms Bayley identified the relevant legislation as the Early Years Foundation Stage (Welfare Requirements) Regulations 2012 (SI No 938). They came into force on 1 September 2012. Regulation 8 provides:

> **8 Provision of information**
>
> (1) A registered early years provider must notify the relevant person of the occurrence of any of the events set out in the Schedule to these Regulations and must at the same time provide the relevant person with the information specified in that Schedule in respect of that event.

That is the current text. Until September 2014, 'the relevant person' was identified as 'the Chief Inspector'. Paragraph 7 of the Schedule states:

> 7. Particulars of any other significant event which is likely to affect the suitability of the early years provider or any person who cares for, or is in regular contact with, children on the premises on which childcare is provided to look after children.

Before these provisions came into force, the Early Years Foundation Stage (Welfare Requirements) Regulations 2007 (SI No 1771) made provision to the same effect.

18. Ms Bayley identified relevant guidance in Ofsted's *Statutory framework for the early years foundation stage* of March 2021:

> 3.78 All registered early years providers must notify Ofsted or the CMA with which they are registered of any change:
>
> ...
>
> - any significant event which is likely to affect the suitability of the early years provider or any person who cares for, or is in regular contact with, children on the premises to look after children.

She also referred us to *Childcare: significant events to notify Ofsted about* of March 2022:

> **Examples of significant events**
>
> We cannot list all possible events that you may need to tell us about. But we have listed some examples to help you to decide what may count as a significant event. In any case, if something happens that is likely to affect an individual's continued suitability to care for or be in regular contact with children, you should count it as a significant event.
>
> Examples of significant events may include:
>
> - involvement with safeguarding partners and statutory agencies about incidents or concerns that might affect someone's suitability, for instance child protection, welfare or safety investigations. These agencies and organisations could include: the police, your local authority (and services within it), mental health services, drug/alcohol services, fire services, environmental health, and building control and planning departments
>
> …
>
> - an incident where a child or children may have been at risk of harm, for example:
>  - you were involved in a car accident when transporting children and the police are investigating a possible offence
>  - a child was able to leave a setting or was missing for any period
>  - a child was not adequately supervised (such as being left unattended in a car)
>  - an unauthorised person gained access to the childcare premises
> - if you have been the victim of a crime that occurred on the childcare premises, such as assault, harassment or vandalism
> - any incidents of domestic abuse
> - any incidents of self-harm or overdose
> - any one-off or ongoing incidents on or around your premises that may affect children, such as violence, criminal or sexual exploitation and gangs, county lines activity, grooming and child trafficking
>
> …

Finally, Ms Bayley referred us to Ofsted's *Early Years and Childcare Enforcement Policy* of March 2022:

> Allegations of serious harm or abuse by any person living, working or looking after children at the premises (whether the allegations relate to harm or abuse committed on the premises or elsewhere) and any relevant actions taken.

19. As Ms Bayley conceded, that does not necessarily show the guidance in force at the relevant dates. It is, though, the best we have and DBS did not challenge it.

## F. MSB's evidence

20. In making our decision, we have relied on MSB's evidence. She gave oral evidence for most of the morning of the hearing. She was questioned by Ms Bayley, cross-examined by Ms Hartley, and questioned by the panel. In our judgement, her evidence was honest and reliable. It was consistent and plausible; we detected no sign of exaggeration. When questioned about safeguarding issues, the specialist panel

members were able to use their experience of safeguarding to judge her answers. Her evidence was tested, but not shaken by, cross examination.

**G. On dates prior to 22 November 2012, whilst registered as a child-minder, you failed to notify Ofsted of your husband MB receiving a Conditional Discharge on 08 February 2012, for Battery against his 16yr old son.**

21. We start with this, which is the earlier of DBS's findings. We find it proven as stated. It was not disputed.

22. Just to be clear, MB is now MSB's husband. The son in question is his son, not MSB's. The evidence at page 206 is that MB smashed a door to gain entrance (criminal damage) and grabbed his son's arm during a domestic violence incident when he was going for MB's throat (battery). MB was given a joint sentence for the two offences: a conditional discharge for 12 months and £200 compensation. This is how the Sentencing Council explains conditional discharge:

> **Discharges**
>
> Discharges are given for the least-serious offences such as very minor thefts.
>
> A discharge means that the person is released from court without any further action. But they will still get a criminal record.
>
> The court may give an offender an **absolute discharge**. This means that the court has decided not to impose a punishment because the experience of going to court has been punishment enough.
>
> The court can also give a **conditional discharge**. This means that, if the offender commits another crime, they can be sentenced for the first offence and the new one.
>
> A discharge can be combined with an order for disqualification, payment of compensation or court costs.

23. Ms Bailey's first ground of appeal was that DBS made a mistake of fact by finding that MSB 'minimised the actions of MB leading to his conviction for battery in 2012, as alleged or at all'. This refers to the statement in DBS's decision letter that: 'you minimised your husband's actions in relation to him committing the offence of Battery against his 16yr old son in 2012'. If that was a finding of fact on which the decision was based, we find that it was a mistake. The only evidence we have is from the Referral Information Summary by Ofsted to DBS at page 185:

> *Concern expressed that MSB was minimising battery against his child.
>
> 'MSH [now MSB] said MB just held his son's arm to push him aside.'

24. We find that MSB did not minimise the offence. She told us, and we accept, that she did not know (or want to know) the precise details of what had happened and did not attend the court. She was just getting together with MB, had not been present when the incident took place, and only knew what MB had told her, which was that he had held his son's arm to move him aside. Her tone when giving evidence emphasised her displeasure at any such event having happened. We do not know who said that MSB had minimised the offence, what they knew about the offence, or what they knew of MSB's knowledge of the offence. In the absence of that information, it is impossible to evaluate how reliable that evidence is. It is not sufficient to displace MSB's oral

evidence, which we accept. In making our decision on disposal, we have found that she did not minimise the offence.

25. Ms Bayley's second ground of appeal was that DBS made a mistake of fact by finding that MSB 'lacked empathy and/or was unable to empathise with MB's son about the offending behaviour, as alleged or at all'. If that was a finding of fact on which the decision was based, we find that it was a mistake. Our reason is the same as we have just given: MSB's response was based on what MB had told her.

26. Ofsted's dealings with MSB begin at page 184. Its reaction when it learned of the Conditional Discharge was to warn her of the duty to notify significant events, supplemented by a discussion about the possible relevance of incidents that occurred outside the business. MSB did report an incident in January 2013. Inspections in 2013, 2014 and 2017 all resulted in a rating of 'good'. There were no causes of concern until we come to the events in DBS's other finding.

**H. On dates prior to 25 May 2021, whilst registered as a child-minder, you failed to notify Ofsted of critical concerns regards household members, denying Ofsted the opportunity to adequately risk assess and safeguard the children in your care.**

27. This finding refers to two allegations of rape against MSB's son.

*The first allegation*

28. The first allegation was made in 2018. MSB's son, who was 15, told his mother that he had had intercourse with his girlfriend who was 14. He said that it had been consensual. Both were under age and he had been a virgin at the time. He said that, when her friend found out what had happened, his girlfriend said it was rape. MSB did not act on what her son had told her. As she put it to us, she was not going to take a 15 year old boy's word on anything. MSB told us that the school was dealing with the matter in-house without police involvement. The police only became involved when MSB contacted them, which she did when the girl's uncle began to send threatening messages. The school did not exclude or suspend her son and there was no mention of LADO involvement. Both he and his girlfriend continued to attend school without restriction. MSB tried to contact the member of staff responsible for safeguarding, but there was a delay before the person replied. By the time MSB received a reply, the allegation had been investigated and resolved on the basis that the allegation of rape was not correct.

29. Ms Bayley's third ground of appeal is that DBS made a mistake of fact by finding that MSB 'justified her failure to report the alleged rape by saying the girl had lied, as alleged or at all'. If that was a finding of fact on which the decision was based, we find that it was a mistake. MSB did not report the allegation because an investigation came to the conclusion that it was not true. That investigation was carried out promptly and independently by the member of staff at her son's school who was responsible for safeguarding. The school had decided not to act on the allegation until the investigation was complete. In those circumstances, we find that MSB was not in breach of her duty to disclose.

*The second allegation*

30. The second allegation relates to 4 July 2020. MSB reported the allegation to Ofsted on 9 February 2021. That was 12 days after she was informed by the police on 25 January 2021. She was allowed 14 days in which to report.

31. We accept MSB's evidence that she did not know of the allegation until the police visited to speak with her son. We have already explained the impression we had of her oral evidence at the hearing. What she told us is consistent with the evidence that the police did not want the family to know of the allegation:

> At this time [MSB's son] has not been spoken to but it is hoped he will be spoken to in the next few weeks. At this time the integrity of the investigation is paramount, and police are keen to secure [his] mobile phone. It is felt that disclosure to [MSB] before this is carried out could be detrimental to the investigation. (Page 208)

32. The only evidence to the contrary is in the LADO report at pages 209-210. It is recorded that MSB may have been aware from August 2020. The reported noted: 'it is unknown who reported this … could be 3rd or 4th hand information and it is unknown what details were shared.' We have placed no reliance on that evidence given the unknowns.

33. Ms Bayley's fourth ground of appeal is that DBS made a mistake of fact by finding that MSB 'knew about the second allegation of rape in August 2020 but chose not to report to Ofsted until 12 days after contact from the police, on 9 February 2021, as alleged or at all.' We accept that argument. DBS made a mistake to find that MSB was aware of the allegation before the police became involved.

## I. Conclusion so far

34. That leaves us in the position we set out in our direction to the parties of 16 July 2023. We have not referred to DBS's specialist fact-finding expertise. Whatever expertise DBS's decision-makers have, it is not engaged in relation to the evidence in this case: *RI* at [31]. It will, though, be engaged when we come to the disposal stage of this appeal.

35. Ms Bayley had two other grounds of appeal on matters of fact. They were that DBS made mistakes of fact by finding that MSB: 'is likely to chose to ignore her safeguarding responsibilities to children in future'; and 'is unlikely to meet her safeguarding responsibilities to vulnerable adults as alleged or at all.' We accepted her argument. Given our findings on minimising MB's assault on his son and on the rape allegations, there is no longer a basis for drawing these general conclusions.

## J. Relevant conduct

36. In deciding on disposal, we have considered whether a failure to disclose is, or is capable of being, relevant conduct. Ms Hartley argued that a failure of itself and without more was relevant conduct. We have no heard argument on that issue and prefer not to express a view. We have assumed for the sake of argument in making our decision on disposal that a mere failure to report is relevant conduct.

## K. The removal from the lists

37. The Upper Tribunal has no power to remove MSB from the lists; that is a matter for DBS alone. Section 4(6)(a) authorises the Upper Tribunal to direct DBS to exercise that power. The Upper Tribunal may exercise that power when it has found mistakes in all DBS's findings of fact. If it did not apply in those circumstances, the power would be redundant. The Upper Tribunal may also exercise that power when it has found mistakes in some, but not all, of DBS's findings. That is what has happened here. The Court of Appeal explained when the tribunal can exercise that power in *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575, [2022] 1 WLR 1022 at [73]. The test is whether removal from the barred lists 'is the only decision that DBS could lawfully reach in the light of the law and the facts as found by the Upper Tribunal.' We have already set out the parties' submissions on whether that test is satisfied in this case.

38. Ms Hartley quoted the example the Court gave in [73]: where the Upper Tribunal had found that an appellant had committed an act of sexually inappropriate with one child rather than two. Like all judicial examples, that was given to make a point and it does so by using a clear set of circumstances. It was not limiting the exercise of the power to similar or analogous circumstances. It is not appropriate to decide this case, or any case, by comparison with the limited information given in the example. We have to apply the test, not the example, and apply it to the individual circumstances of this particular case. Having done so, we are satisfied that the only decision DBS could lawfully make is to remove MSB from the lists. We have directed DBS accordingly.

39. The position on the basis of our findings is this. MSB set up in business in 2011. In the early stages, she failed to report her future husband's conviction for assault. The combined sentence for that offence and criminal damage was a conditional discharge and a compensation order. In the language of the Sentencing Council, that means that the court viewed what happened as among 'the least-serious offences'. When Ofsted learned of the conviction, its response was to give MSB a warning and advice. That was the view of her specialist regulator at the time. As a result of our findings, there is no longer a finding that MSB minimised MB's role in what happened, and the other findings on the rape allegations no longer stand. And, to repeat, after questioning MSB our members were satisfied that she understood safeguarding analysis and issues.

40. The finding of a failure to disclose in 2012 is an isolated one. On our findings, there was no other failure before DBS made its decision in 2022. It was a failure by someone relatively new to the business. The specialist regulator considered that a warning and advice were sufficient. Thereafter, it was satisfied on inspection and dealings with MSB that she was operating her business properly. They were satisfied that she *understood* the need to report. The history of the decade following the failure allows us to set it in an historical perspective. In our view, it would be irrational to bar her in the circumstances as we have now found them to be at the time of DBS's decision.

**Authorised for issue**
**on 27 February 2024**

**Edward Jacobs**
**Upper Tribunal Judge**
**Rachael Smith**
**Matthew Turner**
**Members**