IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000188-V**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the Disclosure and Barring Service

Between:

S.M.

Applicant

- v -

The Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Wikeley

Hearing date: 4 April 2023
Decision date: 11 April 2023

Representation:

Applicant:	Mr S. A. Salam, Solicitor
Respondent:	Mr A. Weiss of Counsel, instructed by DLA Piper on behalf of the DBS

NOTICE OF DETERMINATION OF
APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 2, 5, 21 & 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

ORDER UNDER RULE 14

Pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), the Upper Tribunal orders that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify either the Applicant or any other individuals mentioned in the case papers.

REASONS FOR DECISION

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

1. This application for permission to appeal is refused.

A summary of this Upper Tribunal ruling

2. I conclude that it is not arguable that the Upper Tribunal has the power to remove a person from one of the barred lists with retrospective effect and nor is it arguable that it has the power to direct the DBS to remove an individual from a barred list with retrospective effect.

The Rule 14 order

3. I refer to the Applicant in this determination either in those terms or as Mr M, so as to preserve his privacy and anonymity. For that reason, and to protect the similar interests of others, I also make the rule 14 Order set out at the start of this determination.

The oral permission hearing

4. I held an oral hearing by video-link of the permission application on 4 April 2023. Mr M attended in person, although in the event he was only able to join the proceedings by audio-link. The Applicant was represented by Mr S.A. Salam, Solicitor. The Disclosure and Barring Service (DBS) was represented by Mr A. Weiss of Counsel. I am grateful to them both for their submissions. It is right to note that the video-link 'froze' on a handful of occasions when Mr Salam was making his submissions. However, I ensured that we recovered any 'lost ground'. I also had the benefit of detailed written skeleton arguments filed by both representatives. I am accordingly confident that nothing of substance was lost as a result of minor technical glitches.

Some general principles about permission applications in safeguarding cases

5. The Upper Tribunal has a discretion about whether to give permission to appeal. Section 4(2) of the Safeguarding Vulnerable Groups Act 2006 (the 2006 Act) confers a right of appeal to the Upper Tribunal against a DBS decision under Schedule 3 to the 2006 Act but only in two types of situation.

6. The first basis is on the ground of a mistake in any finding of fact on which the DBS's decision to include or retain a person on a barred list was based. The mistake of fact must be a *material* or *relevant* mistake of fact.

7. The second and alternative basis is on the ground of an error on the part of the DBS on any point of law.

8. In addition, and despite all 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) of the 2006 Act). So, appropriateness for barring is exclusively a question for the DBS (see also the leading case of *R v (Royal College of Nursing and Others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin)).

The background

9. The Applicant was employed for a short period as a new recruit in the care sector. He was summarily dismissed by his employer for allegedly failing to

report safeguarding concerns relating to more experienced colleagues. His employer also reported him to the DBS. In fact it appears that the safeguarding concerns in question were already in the open and were being investigated (including by the police). There is no suggestion whatsoever that the Applicant himself had engaged in any conduct which might raise safeguarding concerns.

The chronology of the DBS decision(s) under challenge

10. The bare chronology of this case is not in dispute.

11. On 26 October 2021 the DBS sent Mr M a final decision letter in which it informed him that it had decided it was appropriate and proportionate to include him on both the Adults' Barred List and the Children's Barred List.

12. On 26 January 2022 the Applicant filed with the Upper Tribunal an application for permission to appeal against that DBS decision.

13. On 29 July 2022 the DBS wrote to the Applicant advising him that it had "undertaken a review of the decision to include you in the barred lists in accordance with the provisions of paragraph 18A, Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (SVGA)". The outcome of this review was stated in the following terms: "We have carefully considered the information we hold about you and we are of the view that it is no longer appropriate for your name to remain included in the Adults' Barred List or the Children's Barred List." This decision was stated to be effective as of 28 July 2022.

14. On 4 August 2022, and in the light of the Respondent's letter of 29 July 2022, I signed off Directions inviting the Applicant to withdraw his application for permission to appeal. The Applicant, by his representative, declined to withdraw his application. In short, the Applicant's argument was that the DBS should have removed his name from both barred lists with effect from the date of his original inclusion (26 October 2021) and not only as with effect from 28 July 2022.

The legislative framework

15. There are three statutory provisions of particular note in this context in terms of the decision-making and appellate regime: paragraphs 18 and 18A of Schedule 3 to the 2006 Act and section 4 of that same Act. First, paragraph 18 of Schedule 3 to the 2006 Act makes provision for the review by the DBS of barring decisions:

> **18.—**(1) A person who is included in a barred list may apply to DBS for a review of his inclusion.
>
> (2) An application for a review may be made only with the permission of DBS.
>
> (3) A person may apply for permission only if—
>
> (a) the application is made after the end of the minimum barred period, and
>
> (b) in the prescribed period ending with the time when he applies for permission, he has made no other such application.

(4) DBS must not grant permission unless it thinks—

(a) that the person's circumstances have changed since he was included in the list or since he last applied for permission (as the case may be), and

(b) that the change is such that permission should be granted.

(5) On a review of a person's inclusion, if DBS is satisfied that it is no longer appropriate for him to be included in the list it must remove him from it; otherwise it must dismiss the application.

(6)The minimum barred period is the prescribed period beginning with such of the following as may be prescribed—

(a) the date on which the person was first included in the list;

(b) the date on which any criterion prescribed for the purposes of paragraph 1, 2, 7 or 8 is first satisfied;

(c) where the person is included in the list on the grounds that he has been convicted of an offence in respect of which a custodial sentence (within the meaning of section 76 of the Powers of Criminal Courts (Sentencing) Act 2000 (c. 6) or section 222 of the Sentencing Code) was imposed, the date of his release;

(d) the date on which the person made any representations as to why he should not be included in the list.

16. Secondly, paragraph 18A of Schedule 3 to the 2006 Act makes further provision for the review of barring decisions:

18A.—(1) Sub-paragraph (2) applies if a person's inclusion in a barred list is not subject to—

(a) a review under paragraph 18, or

(b) an application under that paragraph,

which has not yet been determined.

(2) DBS may, at any time, review the person's inclusion in the list.

(3) On any such review, DBS may remove the person from the list if, and only if, it is satisfied that, in the light of—

(a) information which it did not have at the time of the person's inclusion in the list,

(b) any change of circumstances relating to the person concerned, or

(c) any error by DBS,

it is not appropriate for the person to be included in the list.

17. Finally, section 4 of the 2006 Act then makes the following provision for appeals against specified DBS decisions:

Appeals

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

(a) . . .

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

(c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.

(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—

(a) on any point of law;

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.

(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.

(5) Unless the Upper Tribunal finds that 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.

18. It is also relevant to have regard to section 7 of the 2006 Act which deals with criminal liability. Section 7(1)-(4) provide as follows:

Barred person not to engage in regulated activity

7.—(1) An individual commits an offence if he—

(a) seeks to engage in regulated activity from which he is barred;

(b) offers to engage in regulated activity from which he is barred;

(c) engages in regulated activity from which he is barred.

(2) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or to a fine, or to both;

(b) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, or to a fine not exceeding the statutory maximum, or to both.

> (3) It is a defence for a person charged with an offence under subsection (1) to prove that he did not know, and could not reasonably be expected to know, that he was barred from that activity.
>
> (4) It is a defence for a person charged with an offence under subsection (1) to prove—
>
> (a) that he reasonably thought that it was necessary for him to engage in the activity for the purpose of preventing harm to a child or vulnerable adult (as the case may be),
>
> (b) that he reasonably thought that there was no other person who could engage in the activity for that purpose, and
>
> (c) that he engaged in the activity for no longer than was necessary for that purpose.

19. In short, the question that now arises on this application for permission to appeal is whether a decision to remove a person from a barred list can have retrospective effect.

The case law

20. This question has not been the subject matter of any decision by the Upper Tribunal on a full appeal. It has, however, been considered in a determination on an application for permission to appeal in *NI v DBS* [2017] UKUT 35 (AAC). In that ruling Upper Tribunal Judge Markus QC held that a decision to take a person off a barred list had prospective but not retrospective effect. The core of her reasoning was as follows:

> 6. The Upper Tribunal's powers on appeal against the decision by DBS to include her in a List are found in section 4(5)-(7) of the 2006 Act. Where the Upper Tribunal is satisfied that DBS made a mistake of law or fact, it must direct DBS to remove the person from the list or remit the matter to DBS for a new decision: section 4(6). The statutory language does not indicate that removal could be retrospective. It is not arguable that it could be interpreted to include retrospective removal, as I now explain.
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> 7. It is helpful to start with the powers of DBS on review. The power of removal in paragraph 18A arises both where DBS is satisfied of matters that call into question the original decision (i.e. there was missing information at the time of inclusion or there was an error by DBS), and where it is satisfied that circumstances have changed so that the continued inclusion on the list is no longer appropriate. It could not have been intended that change of circumstances could lead to retrospective removal and, as the power is the same regardless of the basis on which DBS decides the person should not be included in the list, it is clear that the power to remove is not retrospective.
>
> 8. That being so, I am also satisfied that there is no power in the Upper Tribunal to direct that removal from a list is retrospective. There is no indication in the Act that the Upper Tribunal is able to direct DBS to do something that the Act does not otherwise empower DBS to do. The Act does not give the Upper Tribunal power to quash the original decision, which is what retrospective removal would amount to. It is not

> arguable that under section 4(6)(a) the Upper Tribunal is empowered to direct DBS to do something that it would otherwise lack power to do. In addition, for the same reasons as I have given in respect of paragraph 18A – that is, because the Upper Tribunal's powers are the same whether or not DBS's decision was wrong from the outset - the power to direct removal under section 4(6)(a) cannot mean retrospective removal.
>
> 9. There is also a powerful pragmatic reason for this. Inclusion in a list is a matter of historic fact. History cannot be rewritten by DBS on review. While a person is on a list, it is a criminal offence for the person to engage in regulated activity from which they are barred, or for an employer to engage them in such activity. That state of affairs cannot be altered retrospectively. If it could, it would mean that the success of a prosecution would depend on whether their trial takes place before or after a review by DBS.

21. This application provides the opportunity to revisit that determination.

An initial question of jurisdiction

22. The first matter to be addressed is a technical question of jurisdiction. Mr Salam, for the Applicant, argued that the decision under challenge was the original DBS decision dated 26 October 2021 ('the first decision') read together with the paragraph 18A decision dated 29 July 2022 ('the second decision'). However, Mr Weiss, for the DBS, opened his oral submissions by arguing that the submissions made on the Applicant's behalf impermissibly conflated the two decisions by the DBS.

23. So far as the first decision was concerned, Mr Weiss's submission was that this original decision had lapsed by virtue of Mr M's subsequent removal from the bared list. In this context Mr Weiss relied on the following passage in *DF v DBS* [2015] UKUT 199 (AAC):

> 40. It is also plain from section 4 and paragraph 18A of Schedule 3 … that decisions on appeals and reviews both look forward. An error in a decision to include a person in a list may result in the person being removed from the list but it does not follow that the person may not still be convicted of an offence under section 7 of the 2006 Act if he or she worked, or tried to work, in any relevant regulated activity while included in a list.
>
> 41. It is for this reason that, in our judgment, an appeal lapses if a person is removed from the relevant list while the appeal is pending.

24. It followed, Mr Weiss contended, that as the first decision had lapsed there was no jurisdiction under section 4(1)(a) of the 2006 Act to consider any appeal against that decision.

25. So far as the second decision was concerned, Mr Weiss's submission was that this was not a decision which gave rise to any right of appeal under section 4(1)(b). That sub-section provided for a right of appeal against "a decision under paragraph … 18A of that Schedule <u>not to remove him from the list</u>" (emphasis added), whereas in this instance the paragraph 18A decision was a decision <u>to remove him from the list</u>. It followed, Mr Weiss

submitted, that there was no jurisdiction to hear a challenge to the latter decision.

26. The Respondent had not made this jurisdictional argument in such stark terms at any earlier stage in the proceedings. There had been a passing reference in earlier correspondence from the Respondent to the possibility of a strike out but the matter was not pursued further. Indeed, the jurisdictional argument had not been advanced in Mr Weiss's detailed skeleton argument as filed the day before the hearing. Mr Weiss very fairly and candidly acknowledged that the submission in these terms had only occurred to him shortly before the hearing.

27. Even though the Applicant is legally represented, I was concerned that what was effectively a new point as to jurisdiction introduced at a very late stage in the proceedings might put Mr M at an unfair disadvantage. I also noted that Mr Weiss did not in terms apply for the application for permission to appeal to be struck out for want of jurisdiction. Rather, Mr Weiss was relying on this submission as part of his overall armoury for arguing that permission to appeal should be refused. In addition, it seems to me at least very arguable that the second decision was not simply a decision under paragraph 18A of Schedule 3 to remove the Applicant from the list and so outside the scope of section 4(1)(b). On the contrary, the substance of that second decision (if not its form) was a decision under paragraph 18A of Schedule 3 not to remove Mr M from the list from a date earlier than 28 July 2022.

28. I therefore reject Mr Weiss's technical submissions as to jurisdiction and find that the Upper Tribunal does have the jurisdiction to consider Mr M's application for permission to appeal. The question then is whether, as the Applicant contends, the DBS and/or the Upper Tribunal can make a decision that retrospectively removes a person from a barred list.

The question of retrospectivity

29. In summary, Mr Salam submits that the Upper Tribunal has the power to direct that the DBS remove Mr M from a barred list retrospectively. This is a case in which it is conceded by the DBS that the decision to bar was erroneous from the outset. That being so, it is important for the Applicant's good reputation and his career prospects (e.g. in the care sector) that the DBS record is also corrected from the outset.

30. Mr Weiss, on the other hand, invites the Upper Tribunal to refuse permission to appeal on the basis that it is not arguable that the Upper Tribunal has the power to direct that the DBS remove the Applicant from a barred list retrospectively.

31. I agree with Mr Weiss, principally for the following four main reasons.

32. First, the wording of the legislative scheme supports Mr Weiss's position. There is nothing in section 4 of the 2006 Act that suggests that the Upper Tribunal has the power to remove an individual from a barred list with retrospective effect or to direct that the DBS do so (see, for example, section 4(6)). Mr Salam seeks to counter this argument by submitting that conversely there is nothing in the statutory scheme (e.g. in section 4) that prevents removal from a barred list with retrospective effect. However, the

difficulty with that submission is that it overlooks an important principle of statutory construction, namely that legislation is presumed not to have retrospective effect in the absence of clear words to the contrary (see e.g. *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40; [2004] 1 AC 816).

33. Second, the Upper Tribunal's case law supports Mr Weiss's position. This is not a question of Judge Markus QC's refusal of permission ruling in *NI v DBS*, which I come to shortly. Rather, a series of Upper Tribunal decisions on full appeals have emphasised the forward-looking nature of decisions made under the 2006 Act. These include in particular *AKM v DBS* [2014] UKUT 66 (AAC) at paragraph 28, *MR v DBS* [2015] UKUT 5 (AAC) at paragraph 8 and *DF v DBS* [2015] UKUT 199 (AAC) at paragraphs 40-41 (referred to above at paragraph 23). Mr Salam in response seeks to rely on the Court of Appeal's judgment in *DBS v AB* [2021] EWCA Civ 1575. However, the issue of retrospectivity did not arise for decision in that case. Further, and in any event, both the tenor and thrust of the Court's judgment in that case was to a restrictive reading of the Upper Tribunal's role in safeguarding decisions.

34. Third, Judge Markus QC's refusal of permission ruling in *NI v DBS* supports Mr Weiss's position. I fully accept Mr Salam's point that Judge Markus's ruling is not a binding precedent. I also acknowledge that there is a difference on the material facts between the two cases, in that in the case of *NI v DBS* there had been no concession that the listing decision was erroneous from the outset. However, Judge Markus's reasoning remains sound. In particular, as the Judge explained at paragraph 7 of her ruling:

> … The power of removal in paragraph 18A arises both where DBS is satisfied of matters that call into question the original decision (i.e. there was missing information at the time of inclusion or there was an error by DBS), and where it is satisfied that circumstances have changed so that the continued inclusion on the list is no longer appropriate. It could not have been intended that change of circumstances could lead to retrospective removal and, as the power is the same regardless of the basis on which DBS decides the person should not be included in the list, it is clear that the power to remove is not retrospective.

35. Fourth, and crucially, the interplay between on the one hand the safeguarding decision-making and appeals regime and on the other hand criminal liability under section 7 of the 2006 Act supports Mr Weiss's position. As Mr Weiss put it, a power (whether vested in the DBS or the Upper Tribunal) to direct retrospective removal from a barred list would undermine the criminal justice process. A person could be convicted under section 7 only for that conviction to be undermined if the individual was subsequently retrospectively de-barred. In addition, as Judge Markus noted, issues of pure chance would then intrude into the criminal justice system as "it would mean that the success of a prosecution would depend on whether their trial takes place before or after a review by DBS".

36. I now turn to consider the main remaining submissions made by Mr Salam on behalf of the Applicant.

37. Fist of all, Mr Salam submitted that the Applicant would be at a serious disadvantage in applying for jobs as it remained the case that he had been on the barred lists from 26 October 2021 until 28 July 2022. I recognise that there is some force in this argument. I also accept it may be little consolation that the DBS has now accepted the Applicant should never have been placed on the barred lists in the first place. Mr Weiss, on instructions, reports that any inquiry or search now made to the DBS will not reveal that the Appellant was ever on any list. That may well be right, but of course the Applicant may well be concerned that he may be asked a direct question by a prospective employer. If he is asked "are you on a barred list?", he can of course respond with a clear conscience in the negative. But if he is asked "are you now, or have you ever been, on a barred list?", he faces something of a quandary. He could tell the truth and explain that the DBS has accepted he was included in error, in which case he runs the risk that an employer may take the "no smoke without fire" view and reject his application. Or he could lie. Neither option may be an attractive proposition. It follows that I do not underestimate the potential difficulties faced by Mr M in the jobs market. However, for the reasons explained above, the arguments against a de-barring decision having any retrospective effect are the more compelling.

38. Furthermore, such difficulties in the jobs market do not necessarily primarily arise out of the DBS decision. It is far more likely that a prospective employer will ask questions about the reason for a person leaving a job than historic questions about their barring status. In the present case, the Applicant was summarily dismissed before there was any active DBS involvement – his employer first referred Mr M to the DBS on 8 October 2020, and then referred him again on 5 January 2021, having rejected Mr M's internal appeal on 24 December 2020 against his summary dismissal (on 30 November 2020). The DBS sent the Applicant an 'early warning letter' on 2 November 2020 but the 'minded to bar letter' did not follow until 17 October 2021. It follows that there can be no suggestion that the Applicant lost his job because of the DBS's involvement and its barring decision, as that followed sometime later.

39. Secondly, Mr Salam took issue with the drafting of the paragraph 18A decision letter. In particular, he criticised the way in which the outcome of the review had been communicated to his client: "We have carefully considered the information we hold about you and we are of the view that it is no longer appropriate for your name to remain included in the Adults' Barred List or the Children's Barred List" (emphasis added). This was, Mr Salam submitted, positively misleading as the letter used the language of a paragraph 18 outcome ("no longer appropriate"), whereas in this case the DBS had accepted it had never been appropriate for Mr M to be barred. But, as the Upper Tribunal observed in *AKM v DBS*, "the situation where there is a decision and a review decision is likely to place demands on the respondent's decision-writing skills" (paragraph 32). However, the fact remains that this submission is more in terms of a customer care complaint – it does not in itself lend any weight to the argument that there is a power retrospectively to remove a barred person from the lists.

40. Thirdly, Mr Salam criticised the DBS for taking what he described as an overly bureaucratic and even mean-spirited approach. He argued that the

DBS paragraph 18A outcome decision letter should have been phrased so as to make it clear that Mr M's inclusion on the barred lists was due to an error on the part of the DBS and it was simply "not appropriate" for him ever to have been included. This is really another way of putting the second point and suffers from the same deficiency.

41. Finally, Mr Salam also pointed to the discrepancy over the dates in the paragraph 18A review decision letter. The DBS letter was dated 29 July 2022 but stated that it had removed the Applicant from the barred list with effect from 28 July 2022. As such, the DBS was purporting to do precisely what it stated it had no power to do, namely make a decision with retrospective effect. In this respect I consider one has to be realistic about administrative processes. There was no suggestion in the decision letter that the Respondent saw itself as making a retrospective decision. By far the most likely explanation is that the decision was taken on 28 July 2022 with effect from that date but was simply communicated by a letter that happened to be dated the following day.

Conclusion

42. The Applicant's proposed appeal has, in my view, no realistic prospect of success. Accordingly, I refuse permission to appeal to the Upper Tribunal.

Nicholas Wikeley
Judge of the Upper Tribunal

Approved for issue on 11 April 2023